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TEMPERANCE, TAXATION, AND TURMOIL: FEDERAL REGULATION OF INTOXICATING BEVERAGES 1789-1918

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Abstract

This paper presents a history of the federal role in regulating the manufacture, sale, and distribution of alcoholic beverages in the United States from the opening of the First Congress of 1789 to the enactment of the Eighteenth Amendment in 1918. Beginning with the passage of the nation's first tariff, imposing duties on imported beer, wine, and spirits, and ending with the onset of national Prohibition and the complete ban on the manufacture and sale of intoxicating beverages, the story of the federal regulation of alcohol from 1789 to 1918 encompasses a wide variety of political, economic, sociological, and constitutional issues and features a series of epic debates and even violent struggles involving all three branches of government.

On April 8, 1789, Representative James Madison of Virginia rose in the House of Representatives to propose the first substantive resolution ever considered by that newborn body, the levying of an import duty on alcoholic beverages and a number of other commodities commonly used by the citizens of the young nation.¹ Informing his colleagues that the subject was “of the greatest magnitude; requir[ing] our first attention, and our united exertions,” Madison called for the creation of a tariff on rum and “all other distilled spirits,” on Madeira wine and “all other wines,” and on the molasses that would be made into rum once it reached American shores.² From the moment Madison proposed his duty on intoxicating beverages, the role of the federal government in regulating the manufacture, sale, and distribution of alcohol has been a flashpoint

¹1 ANNALS OF CONG. 106-07 (Joseph Gales, ed. 1789). Although the House was scheduled to meet on March 4, it was not until the first day of April that a quorum was obtained. Representatives spent the first week of April adopting organizational rules, and it was not until the 8th that the oath of office was administered to the assembled members and substantive debate began with Madison's proposal. WILLIAM E. JOHNSON, THE FEDERAL GOVERNMENT AND THE LIQUOR TRAFFIC 54 (1917).

²1 ANNALS OF CONG. 107 (Joseph Gales, ed. 1789).

of controversy. From Madison’s proposal in 1789 to the ratification of the Eighteenth Amendment in 1918, that role varied widely, ranging from an almost complete abdication of responsibility over alcohol policy to an unprecedented constitutional ban on the manufacture, sale, or transportation of intoxicating beverages. This paper aims to present an overview of the history of the federal role in regulating the manufacture, sale, and distribution of alcoholic beverages from the days of the first Congress to the onset of Prohibition in 1918, focusing on the major themes and currents of opinion that have shaped that role.³

I. THE TARIFF ACT OF 1789

Madison’s rush to propose a uniform national duty on intoxicating beverages and other commodities stemmed from the same circumstances that had led to the drafting and ratification of the Constitution in which he played so great a role. The Articles of Confederation, which required unanimity among the states for the national government to take action, had proven woefully inadequate to address either the political instability or the precipitous financial situation of the vast, troubled nation that emerged from the struggles of the Revolutionary War. Madison’s Constitution was designed to empower a national government with the ability to take action for the good of the nation as a whole- and one that had the authority to raise the funds that would allow it to do so. By taking advantage of the enhanced powers of Congress under the new Constitution, Madison aimed to stabilize the dire financial situation of the federal government as rapidly as

³Throughout this piece, the terms “alcohol,” “alcoholic beverages,” and “intoxicating beverages” will be used interchangeably to describe the field as a whole. The terms “ardent spirits,” “distilled spirits,” “liquors,” “spirits,” and “spirituous liquors” will be used to describe such high-proof beverages as whisky, rum, and gin, while “beer,” “ale,” and “porter” identify subsets of the general category of “malt beverages.” “Wine,” at least, can stand alone without a separate definition, although most of the wines consumed by Americans in the nineteenth and early twentieth century bear little resemblance to those we enjoy today. See *infra*, notes 134-136, 304 and accompanying text. Many of the legislators and justices cited in this piece casually use the term “liquor” when referring to the general field of intoxicating beverages or subsets thereof (e.g., “malt liquors”); any instances in which that usage might cause confusion will be so noted in the text or footnotes.

possible.⁴ As he explained to the House the morning he introduced his tariff resolution, he hoped to use the “establishment of a more effective government . . . recovered from the state of imbecility that heretofore prevented a performance of [the union’s] duty” to remedy the “notorious” deficiency of the Treasury.⁵

Along with the fiscal and protectionist questions standard to any debate over tariff policy,⁶ the congressional debate on Madison’s proposed import duties involved the question of temperance as well. Temperance, in the early days of the republic, referred not as it would a century later to the abolition of all alcohol from the national diet, but instead to the substitution of fermented and brewed beverages, such as wine and beer, for distilled spirits like rum and whisky.⁷ Americans of the post-Revolutionary era took their liquor hard, and they took it on a regular basis- rum, whisky, gin, and brandy were staples at every meal, at every social event, and, not uncommonly, throughout the working day.⁸ While potable water was in short supply, milk was difficult to transport and carried the risk of disease, and tea and coffee were expensive, ‘ardent spirits’ were cheap, plentiful, and relatively safe to drink.⁹ In his work The Alcoholic Republic, historian W.J. Rorabaugh explains that from 1790-1830, “America may not have been [as one clergyman suggested] ‘a nation of drunkards,’ but Americans were certainly enjoying a spectacular binge.”¹⁰

Many prominent Americans of the time noted their fellow citizens’ drinking habits with dismay and sought a substitute for the hardy ninety-proof beverages that served as a staple of the common American’s daily diet. George Washington, John Adams, and Thomas Jefferson each voiced their apprehension over the sheer volume of hard liquor consumed by their countrymen,¹¹ while Philadelphia physician Benjamin Rush, a signer

⁴See generally 1 ANNALS OF CONG. 106-08 (Joseph Gales, ed. 1789); JOHNSON, *supra* note 1, at 54.

⁵1 ANNALS OF CONG. 107 (Joseph Gales, ed. 1789).

⁶For a good summary of the debate over the tariff outside the context of temperance issues see generally AUGUST THOMANN, LIQUOR LAWS OF THE UNITED STATES; THEIR SPIRIT AND EFFECT 9-24 (1893). August Thomann was hardly a disinterested historian- he served as the director of the United States Brewers’ Association’s publications program and his book was published by that organization. Nevertheless, Liquor Laws of the United States; Their Spirit and Effect is as much a work of history as it is of advocacy, and it serves as a valuable resource on a subject largely ignored by scholars. Every effort has been made during the writing of this piece to take account of Thomann’s bias.

⁷RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT 20 (1995).

⁸*Id.* See generally W.J. RORABAUGH, THE ALCOHOLIC REPUBLIC 5-21 (1979).

⁹RORABAUGH, *supra* note 8, at 95-96.

¹⁰*Id.* at 21.

¹¹*Id.* at 5-6. Rorabaugh notes, however, that Washington owned and operated a whisky still, Adams began each day with a

of the Declaration of Independence, led the nation's first organized campaign against distilled spirits.¹²

Unlike later temperance activists, however, the physicians, clergymen, and legislators of the late eighteenth century who campaigned against hard liquor neither attempted to banish alcohol from the American diet altogether nor saw any reason to do so. Their enemy was not drink, but drunkenness- specifically, the drunkenness that resulted from the constant consumption of high-proof liquors. While Dr. Rush, for example, marshaled the most vehement of arguments against hard liquor, he was known to praise the German immigrants of his home state for eschewing spirits in favor of "beer, wine and cider"¹³ and to advocate the drinking of wine made from native fruits.¹⁴ In a nation in which distilled spirits were the drink of choice, temperance advocates of the late eighteenth century encouraged the use of such lower-proof beverages as wine, beer and other malt beverages.¹⁵

The congressional debate over Madison's proposed tariff on intoxicating beverages therefore featured an undercurrent of near unanimity on the wisdom, *ceteris paribus*, of encouraging a lowered consumption of hard liquor in favor of a corresponding increase in the use of less powerful beverages to quench the thirst of Americans so far as climate, custom, and availability would allow.¹⁶ Representative Thomas Fitzsimmons of Pennsylvania, noting that ardent spirits were "a luxury of the most pernicious kind," argued, "It will be readily granted me, that there is no object from which we can collect revenue, more proper to be subjected to a higher duty, than ardent spirits of every kind; if we could lay the duty so high as to lessen the consumption in any great degree, the better."¹⁷ He later elaborated, "If the morals of the people are to be improved by

tankard of hard cider, and Jefferson was the "inventor of the presidential cocktail party." *Id.*

¹²See *id.* at 39-46.

¹³THOMANN, *supra* note 6, at 28.

¹⁴ANDREW BARR, DRINK: A SOCIAL HISTORY OF AMERICA 37 (1999).

¹⁵See, e.g., THOMANN, *supra* note 6, at 26 ("A rational temperance movement aiming, not at the destruction of the distilleries and the total abandonment of spirituous liquors, but at a refinement of drinking habits, was inaugurated long before the assembling of the first Congress."). See generally RORABAUGH, *supra* note 8, at 30-32, 36-46. For many years, although temperance advocates touted both malt beverages and wine as replacements for 'ardent spirits,' it was far easier for them to promote use of the former intoxicant than the latter. In the aftermath of the Revolution, wine was viewed as a drink of the rich and frowned upon by most citizens as a product that had to be imported and was thus less patriotic than American-produced spirits and beer. See RORABAUGH, *supra* note 8, at 104.

¹⁶See THOMANN, *supra* note 6, at 26-27.

¹⁷1 ANNALS OF CONG. 131 (Joseph Gales, ed. 1789).

what enters into their diet, it would be prudent of the national Legislature to encourage the manufacture of malt liquors.”¹⁸ Fisher Ames of Massachusetts, who opposed a high import tax on rum due to the deleterious effect it would have on the New England shipping industry, nonetheless stated that so long as it did not result in “violence” against other industries:

I would concur in any measure calculated to exterminate the poison covered under the form of ardent spirits. . . . I approve as much as any gentleman the introduction of malt liquors, believing them not so pernicious as the one in common use; but before we restrain ourselves to the use of them, we ought to be certain that we have malt and hops, as well as brew-houses for the manufacture.¹⁹

Elbridge Gerry, also from Massachusetts, opposed a duty on molasses, fearing that it would doom his state’s distilling industry while encouraging the importation of finished rum from the West Indies. He made clear, however, his basic opposition to rum itself no matter from where it came, exclaiming, “It has been frequently observed, that rum is injurious to the morals of the people; if I could have my wish, it would not be to diminish, but to annihilate the use of it, both foreign and domestic, within the United States.”²⁰

After extensive debate, the tariff legislation passed both houses of Congress and was signed by President George Washington on July 4, 1789, making it the second act passed under the new Constitution.²¹ The Tariff Act of 1789²² imposed import duties on ale, porter, and beer; “Jamaica rum” and all other spirits: wines, both Madeira and other varieties; molasses; and malt.²³ The federal government’s regulation of alcohol thus began with a tax designed to raise much-needed revenue for the young nation while protecting its native brewing and distilling industries from foreign competition.

¹⁸*Id.* at 150.

²⁰*Id.* at 221.

²¹JOHNSON, *supra* note 1, at 57.

²²Ch. 2, 1 Stat. 24 (1789).

²³*Id.* at 25.

II. HAMILTON'S EXCISE AND THE WHISKEY REBELLION

It soon became clear, however, that the revenue provisions of Madison's tariff would not be sufficient to fund the federal government. In addition to the \$600,000 needed to finance the annual operation of government, an estimated \$2,239,000 per year was necessary to pay off the national debt compiled during the Revolution.²⁴ The tariff, however, would yield only an estimated \$1,467,000 a year.²⁵ In addition, to the extent that Congress had intended the duties on alcohol to decrease consumption of hard liquor, it was clear that they had not succeeded. Writing a century after the passage of the Tariff Act, author August Thomann explained the self-defeating nature of the tariff:

Specific duties upon *spirituous liquors* were adopted first, because their general consumption offered a strong guarantee for their becoming a lucrative source of revenue; and secondly, because, for moral reasons, popular sentiment seemed to exact them. But the force of either of these reasons, logically considered, must more or less attenuate the other, because they are based on opposite assumptions. The efficacy of the duties in the one case, must necessarily be proportionate to their insufficiency in the other. . . . [U]nder the system adopted, it might occur- and did- that neither the fiscal nor the moral objectives would be attained. Comparatively high duties might operate as a check on the importation of liquors, and that would be a loss to the treasury; yet morality need not necessarily gain anything by it, since the check on the importation must unavoidably act as a correspondingly effective impetus to domestic manufacture.²⁶

Into this financial crisis stepped Secretary of the Treasury Alexander Hamilton, a fiscal conservative willing to consider extending the tax on alcohol to internal production as well as imports. Years before, in his contributions to what would come to be known as The Federalist Papers, Hamilton, writing with Madison and John Jay under the pseudonym of 'Publius,' had advanced the possibility of a federal internal excise tax on spirits, arguing from financial, pragmatic, and moral grounds.

²⁴TUN YUAN HU, THE LIQUOR TAX IN THE UNITED STATES 1791-1947 12 (1950).

²⁵*Id.*

In Federalist No. 12, first published November 2, 1787, Hamilton first endorsed an import tax on spirits, writing:

The single article of ardent spirits under federal regulation might be made to furnish a considerable revenue... That article would well bear [the] duty; and if it should tend to diminish the consumption of it, such an effect would be equally favorable to the agriculture, to the economy, to the morals and to the health of the society. There is perhaps nothing so much a subject of national extravagance as this very article.²⁷

More provocatively, Hamilton continued by emphasizing, “A nation cannot long exist without revenue... Revenue, therefore, must be had at all extents,” even if that meant “taxes on consumption.”²⁸ During the campaign to ratify the Constitution, Hamilton’s Federalist allies actively used this argument to marshal support for the document from citizens who agreed with Hamilton’s assertion that the collapse of the public revenue would lead to “private distress” among the citizenry.²⁹

Nevertheless, as Washington’s Treasury Secretary, Hamilton initially refrained from advocating an internal tax of any kind, well aware that Americans had inherited the English legacy of utter antipathy to internal taxes of any sort.³⁰ In his Commentaries on the Laws of England, Sir William Blackstone had written, “[T]he rigor and arbitrary proceedings of excise-laws seem hardly compatible with the temper of a free nation,”³¹ while Dr. Samuel Johnson, in his famous dictionary of 1755, colorfully defined excise tax as “a hateful tax levied upon commodities, and adjudged not by the common judges of property, but wretches hired by those to whom the tax is paid.”³² As the colonists’ reaction to Parliament’s imposition of the Stamp Act and the tax on tea in the 1760s and 1770s had shown, Americans loathed such taxes even more vehemently than did

²⁸*Id.* at 96.

²⁹RORABAUGH, *supra* note 8, at 50. See FEDERALIST NO. 12 at 96.

³⁰HU, *supra* note 24, at 11.

³¹1 WILLIAM BLACKSTONE, COMMENTARIES *318.

³²SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 170 (E.L. McAdam, Jr. & George Milne eds., 1963).

their English counterparts.³³

It therefore took a certain degree of courage for Hamilton to suggest, in a report to the House dated January 14, 1790, that Congress not only increase import duties on spirits, but introduce the nation's first system of internal revenue in order to tax them domestically as well.³⁴ Hamilton followed this message with an additional plea on March 6 of that year.³⁵ In advancing the cause of an excise tax, Hamilton took great pains to craft and present a system of collection that did not include those elements that had so incensed generations of English subjects and their American descendants. There would be, for example, no summary judgment allowed on the part of collections officers and no searches without warrants except in areas specifically designated for storage by retailers and manufacturers.³⁶ Cognizant of the fact that Americans would object to an internal tax of any sort, no matter how many safeguards he introduced to ensure its fairness, Hamilton coupled his promise of a fairly administered and courteously collected tax with a strong moral plea:

That the articles which have been enumerated, will, better than most others, bear high duties, can hardly be a question... [T]here is, perhaps, none of them, which is not consumed in so great an abundance, as may justly denominate it a source of national extravagance and impoverishment. The consumption of ardent spirits, particularly, no doubt very much on account of their cheapness, is carried to an extreme which is truly to be regretted, as well in regard to the health and morals, as to the economy of the community. Should the increase of duties tend to a decrease of consumption of these articles, the effect would be, in every way, desirable. The saving which it would occasion, would leave individuals more at their ease, and promote a favorable balance of trade. As far as this decrease might be applicable to distilled spirits, it would encourage the consumption of cider and malt liquors, benefit agriculture, and open a new and productive source of revenue.³⁷

On April 27, 1790, acting on Hamilton's impetus, the House passed a resolution to consider an internal tax on distilled spirits.³⁸ A bill was subsequently reported for a vote but went down to a resounding defeat in

³³JOHNSON, *supra* note 1, at 69-70.

³⁴Report of Alexander Hamilton to the House of Representatives, January 14, 1790, 1 AMERICAN STATE PAPERS: FINANCE 15-25 (1832).

³⁵Report of Alexander Hamilton to the House of Representatives, March 6, 1790, 1 AMERICAN STATE PAPERS: FINANCE 151-58 (1832).

³⁶*Id.* at 152-53.

³⁸1 ANNALS OF CONG. 1599-1601 (Joseph Gales ed., 1790).

June, a victim of the visceral opposition on the part of most Congressmen to an excise tax of any sort.³⁹

Two additional events in 1790 increased the level of rancor surrounding Hamilton's plans for an excise tax. Over the course of the tumultuous second session of the First Congress, which lasted from January to August of 1790, Hamilton and his allies in Congress secured the federal assumption of Revolution-related state debts over the vehement opposition of Southern delegates by trading the establishment of the national capital on the Potomac River, as desired by the south, for southern acquiescence in the debt assumption plan.⁴⁰ This compromise left many southern representatives bitter and determined to vote against any excise measure that would tax their constituents to pay off the debt.⁴¹ These sectional divisions were inflamed when, in late December, 1790, Senator Robert Morris and Representative George Clymer of Pennsylvania introduced to their respective houses a resolution, submitted by Dr. Rush's College of Physicians and Surgeons of Philadelphia, requesting that Congress consider that "such heavy duties may be imposed upon all distilled spirits, as shall be more effectual to restrain their intemperate use."⁴² Opposition was sudden and violent, with Representative James Jackson of Georgia denouncing the members of the College, all northerners, as "those gentlemen of the squirt [who] attempted to squirt morality into the minds of the members [of Congress]." ⁴³

When Hamilton's supporters in Congress reintroduced his legislation calling for even higher tariff rates and an internal tax on spirits in January of 1791, they therefore faced an uphill battle. Representative Jackson

³⁹*Id.* at 1694-1700. See Hu, *supra* note 24, at 14.

⁴⁰THOMANN, *supra* note 6, at 39-40. As the session drew to a close, Congress passed a minor increase in tariff rates on spirits, wine, beer, molasses, and malt, but took no further action on internal taxes. Act of August 10, 1790, ch. 39, 1 Stat. 180 (1790).

⁴¹THOMANN, *supra* note 6, at 40, 46.

⁴²1 ANNALS OF CONG. 1886 (Joseph Gales ed., 1790), 2 ANNALS OF CONG. 1783 (1790).

⁴³1 ANNALS OF CONG. 1921 (Joseph Gales ed., 1790).

began the new debate in the House by lecturing the House on the overwhelming consensus, dating back to the time of Oliver Cromwell, that excises were an “odious tax,” citing Blackstone’s condemnation of the measures as evidence.⁴⁴ Josiah Parker of Virginia followed Jackson’s comments by exclaiming, “[The tax] will convulse the government; it will let loose a swarm of harpies, who, under the denomination of revenue officers will range through the country, prying into every man’s house and affairs, and like a Macedonian phalanx bear down on all of them.”⁴⁵ Meanwhile, in the context of general southern anger over the fact that Hamilton’s state debt assumption plan, which they had opposed from the start, had made acute the need for additional federal revenue,⁴⁶ southern representatives decried what they perceived to be an unfair burden on their region. Jackson saw the tax as nothing less than a direct and outrageous attack on the south. While residents of the eastern and middle states could fall back on their nascent cider and beer industries, he heatedly explained to his colleagues, an excise tax on spirits would “deprive the mass of the people [in the south] of almost the only luxury they enjoy, that of distilled spirits.”⁴⁷ Representative John Steele of North Carolina complained that the citizens of his state would, as a whole, pay ten times that of the residents of Connecticut.⁴⁸

Notwithstanding this opposition, the bill’s passage was secured by the efforts of a coalition of pragmatists and moralists. Madison, torn between his general opposition to excises and the desires of his Virginia constituents on the one hand and his role as Hamilton’s floor leader in the House on the other, concluded that an excise tax was the only way to save the federal fisc and lent his influential support to the measure.⁴⁹ Representative Samuel Livermore of New Hampshire, leading the moralists, saw the measure as one that was fair to all citizens and quipped that it would be agreeable to the citizens of the United States to support

⁴⁴*Id.* at 1890-91.

⁴⁵*Id.* at 1891-92.

⁴⁶*See* HU, *supra* note 24, at 14.

⁴⁷1 ANNALS OF CONG. 1891 (Joseph Gales ed., 1790).

⁴⁸*Id.* at 1896.

⁴⁹RORABAUGH, *supra* note 8, at 52-3; HU, *supra* note 24, at 14-5.

their nation by “drinking down the national debt.”⁵⁰

The measure ultimately passed on extremely sectional lines and was signed into law on March 3, 1791.⁵¹ The new law divided the country into fourteen districts, one for each of the then-existing states, but provided that the president could alter boundaries for the purpose of easing the process of collection.⁵² It established the nation’s first revenue collection bureaucracy, with a supervisor of the revenue in each district in overseeing a team of inspectors, each assigned to specific distilleries.⁵³ Distillers were allowed a choice between paying duties before the removal of spirits from a distillery or furnishing bond to secure payment following sale of the spirits.⁵⁴ To encourage the export of spirits, tax rebates were available to distillers for overseas sales.⁵⁵ Owners of small stills could choose between paying a fixed annual tax based on the capacity of their stills or paying taxes on individual gallons as they were actually produced.⁵⁶ Finally, the act stipulated that the revenue collected under its authority could not be applied to the government’s current expenses, but instead had to be used either to pay interest on the public debt or to pay down its principal.⁵⁷

Despite the care taken to fashion as non-intrusive and flexible a means of collection as possible, the tax on distilled spirits engendered vehement and violent opposition among the citizenry from its inception. Even before the measure had passed, in fact, the Pennsylvania legislature passed a resolution opposing any form of

⁵⁰1 ANNALS OF CONG. 1896 (Joseph Gales ed., 1790).

⁵¹Ch. 15, 1 Stat. 199 (1791). The vote in the House highlighted the sectional tension over the measure: representatives from the New England states voted a unanimous seventeen to zero in favor of the bill, those from the middle states favored the bill by a thirteen to eight margin, and the southern delegates opposed the bill five to thirteen. RORABAUGH, *supra* note 8, at 53.

⁵²1 Stat. at 200.

⁵³*Id.*

⁵⁴*Id.* at 203.

⁵⁵*Id.* at 210-11.

⁵⁶*Id.* at 204.

⁵⁷*Id.* at 213-14.

an excise tax.⁵⁸ A combination of hostility to the tax itself and to Hamilton's financial programs, especially the assumption of state debts, led to the passage of anti-excise resolutions in Virginia, North Carolina, and Maryland as well.⁵⁹

It was in western Pennsylvania, however, that the opposition to the excise tax was strongest, ultimately leading to the open revolt that came to be known as the "Whiskey Rebellion." The source of the citizens' outrage in that frontier region of the state stemmed from the very nature of their economy. Residents of Pennsylvania's western counties, situated beyond the Allegheny Mountains hundreds of miles from markets for their rye and corn crops, saw distilling their excess grain and selling it in eastern markets as their only opportunity to derive a livelihood.⁶⁰ While the cost of transporting their grain to the east was prohibitive, distilling allowed the frontier farmers a means of converting that grain into a valuable and transportable product.⁶¹ As a result, nearly every farmer owned a still, and throughout the cash-poor region, whiskey was so common a commodity that it was used as a medium of exchange.⁶² A tax on whisky therefore risked depriving farmers of the market for the one profitable product they had, eliminating the region's single source of revenue. Another problem posed by the tax stemmed from the overabundance of whisky in the region. The ready availability of whisky lowered the price of the item far below that charged in the east, and since the excise per gallon was set at a uniform national rate, this meant that the tax in the west comprised a much higher percentage of the total cost of the product there than elsewhere.⁶³ Finally, any citizen of western Pennsylvania who was charged with a violation of the excise law was required to travel to the federal court in Philadelphia, a distance of up to three hundred miles. The expense of that travel, along with the costs of the trial itself and any fines imposed, threatened to ruin any individual who ran afoul of the revenue

⁵⁸THOMANN, *supra* note 6, at 56 (citing resolution of January 22, 1791).

⁵⁹*Id.* at 60; HU, *supra* note 24, at 17.

⁶⁰HU, *supra* note 24, at 19.

⁶¹*Id.*

⁶²*Id.*

⁶³*Id.* at 20.

collectors.⁶⁴

From the very beginning of the excise tax's operation, therefore, the citizens of western Pennsylvania engaged in both organized and unorganized resistance. On September 6, 1791, federal revenue collector Robert Johnson was seized by a mob, which took his horse, cut off his hair, and tarred and feathered him.⁶⁵ This began a series of attacks on revenue officials, dutifully recounted by Hamilton in an August 4, 1794 report to Congress detailing the opposition to the law.⁶⁶ On August 21, 1792, representatives from the state's four westernmost counties gathered in Pittsburgh to draft a series of resolutions condemning the excise on spirits and to pledge their refusal to deal with any individual assigned to collect the required duties.⁶⁷

As noncompliance with the law remained the norm, violence against revenue officers continued, and collecting the tax from Pennsylvanians became increasingly difficult,⁶⁸ Congress and the administration took steps to assuage the discontent of the frontier citizenry in the hopes of quelling their revolt. In an act signed on May 8, 1792, Congress, on Hamilton's suggestion, reduced the internal duties across the board.⁶⁹ On September 15, Washington issued a proclamation "admonishing and exhorting" opponents of the excise tax from obstructing operation of the law.⁷⁰ In 1793, Hamilton's Treasury Department implemented his plan to encourage obedience of the law by purchasing whisky, for use by the army, from Pennsylvania distillers who had complied with the law.⁷¹ On June 5, 1794, the president signed into law an act granting state courts concurrent jurisdiction on excise tax violations, thus addressing one of the chief objections of western

⁶⁴*Id.*

⁶⁵6 ANNALS OF CONG 2852 (1794) (report of Alexander Hamilton).

⁶⁶*Id.* at 2850-68. Hamilton's report on "[t]he disagreeable crisis at which matters have lately arrived in some of the western counties of Pennsylvania" is an expertly written summary of the actions the Washington administration took to address one of the most important tests faced by the new national government.

⁶⁷*Id.* at 2856.

⁶⁸*See generally id.* at 2850-57; HU, *supra* note 24, at 24-26.

⁶⁹Act of May 8, 1792, ch. 32, 1 Stat. 267 (1792); *see* JOHNSON, *supra* note 1, at 74.

⁷⁰1 MESSAGES AND PAPERS OF THE PRESIDENTS 124 (James D. Richardson ed., 1899).

⁷¹THOMANN, *supra* note 6, at 88.

residents by eliminating the need to travel to Philadelphia for trial in the federal courts.⁷²

The result of the actions taken by the government to increase compliance resulted in a Pyrrhic victory, for while the new measures succeeded in compelling the compliance of the large distillers and wealthier citizens, in doing so, they removed the element of moderation and restraint that those parties had imposed on other, less conservative, opponents of the tax. The remaining dissenters, with little to lose and few voices of moderation among them, became more desperate and thus more violent.⁷³ They turned on distillers who complied with the law, shooting their stills through with holes in a processes dubbed, with no small irony, “mending.” Those who “mended” stills were known as “tinkers,” and posters signed by a mysterious “Tom the Tinker” were posted all over the region, containing threats to those who supported the tax as well as instructions to the insurrectionists recommending further violence.⁷⁴

The violence and mayhem grew until matters came to a head in July 1794. On the fifteenth of that month, a U.S. marshal, accompanied by the local revenue inspector, attempted to serve sixty writs on distillers who had failed to register their stills as required under the excise tax. Over the following several days, the revenue inspector was accosted twice by a mob, the second time so violently that he was forced to flee in terror as the mob burnt down his house. The marshal was taken prisoner and forced to promise never again to serve a process in the western part of the state.⁷⁵ On the twenty-sixth, insurrectionists intercepted the mail from Pittsburgh, and, after reading through the captured letters, banished as traitors all citizens whose correspondence had shown them to be sympathetic to the government.⁷⁶ On August 1, seven thousand armed men demonstrated throughout the western counties, marched through Pittsburgh, and began the process of

⁷²Act of June 5, 1794, ch. 49, 1 Stat. 378, 381 (1794).

⁷³HU, *supra* note 24, at 24-25.

⁷⁴*Id.* at 25.

⁷⁵*Id.* at 26.

⁷⁶*Id.* at 27.

expelling all excise officers and exacting violent revenge on those they knew or suspected had obeyed the hated excise law.⁷⁷

On August 7, an alarmed Washington, acting on Hamilton's recommendation, issued a strongly worded proclamation to the insurrectionists ordering them "to disperse and retire peacefully to their respective abodes" by September 1.⁷⁸ A commission, authorized by Washington and sent by Governor Thomas Mifflin of Pennsylvania, offered full amnesty to the insurrectionists but was rebuffed by their leaders.⁷⁹ On September 15, Washington, having earlier acted pursuant to a 1792 law granting him the authority to call forth the militia of one or more states "whenever the laws of the United States shall be opposed, or the execution thereof obstructed...by combinations too powerful to be suppressed by the ordinary course of judicial proceedings,"⁸⁰ ordered a total of fifteen thousand troops gathered from Pennsylvania, New Jersey, Maryland, and Virginia to meet the rebels.⁸¹ Washington and Hamilton themselves joined the troops, which were commanded by Governor Henry Lee of Virginia.⁸²

By the time the federal forces reached the rebellious counties, however, the Whiskey Rebellion had collapsed, its most fanatical supporters having decided to flee the region rather than to stand their ground against Lee's troops.⁸³ Not a shot was fired, and while Lee left behind 2,500 troops to monitor the region,⁸⁴ the matter was ultimately ended by Washington's July 10, 1795 proclamation granting a general amnesty to anyone who had been involved in the rebellion.⁸⁵

⁷⁷*Id.*

⁷⁸1 MESSAGES AND PAPERS OF THE PRESIDENTS 158 (James D. Richardson ed., 1899).

⁷⁹THOMANN, *supra* note 6, at 100-03.

⁸⁰Act of May 2, 1792, ch. 28, 1 Stat. 264 (1792).

⁸¹HU, *supra* note 24, at 27.

⁸²*Id.* at 30.

⁸³*Id.* at 27-8.

⁸⁴THOMANN, *supra* note 6, at 108.

⁸⁵1 MESSAGES AND PAPERS OF THE PRESIDENTS 181 (James D. Richardson ed., 1899).

Throughout the 1790s, in addition to the specific steps they took to appease the rebels in Pennsylvania, Congress and the Washington administration made a number of attempts to reform and refine the system of taxation and revenue collection. On June 5, 1794, hoping to raise funds without imposing a direct tax on the people, Congress extended the excise tax to carriages, sugar, snuff, auctions, bonds, and slave ownership.⁸⁶ Another act passed that day imposed the nation's first federal license fee on retail sales of alcohol, requiring retailers to pay five dollars a year for selling wines in quantities designed for retail consumption as well as five dollars for selling imported spirits in that manner.⁸⁷ On April 9, 1795, Washington, acting pursuant to the authority granted to him by the 1791 excise legislation,⁸⁸ drew up several new districts and appointed a number of new officers, so that as of 1796, the revenue system employed sixteen supervisors (one for each state and territory), twenty-two inspectors, two hundred thirty-six revenue collectors, and sixty-three auxiliary officers, drawing a total compensation of \$78,000.⁸⁹ Over the course of the next three years, Congress passed a series of acts granting relief to "country distillers," that is, farmers who distilled their own whisky in small quantities, thus mollifying to some degree the core constituency of the Whiskey Rebellion.⁹⁰ None of these measures, however, could prevent the demise of the nation's first internal tax. Thomas Jefferson, in a letter to Madison dated December 28, 1794, had declared, "The excise tax is an infernal one,"⁹¹ and when he became president seven years later, his first message to Congress included a call for the abolition of all internal taxes.⁹² As Jefferson's southern and western supporters, who now comprised a majority of Congress, had opposed the excise all along, he had no trouble garnering support for the measure,⁹³ which he signed into law on April 6, 1802.⁹⁴ On July 1, 1802, the law took effect, and America's

⁸⁶Act of June 5, 1794, ch. 51, 1 Stat. 384 (1794).

⁸⁷Act of June 5, 1794, ch. 48, 1 Stat. 376 (1794).

⁸⁸Act of March 3, 1791, ch. 15, 1 Stat. 199, 200 (1791).

⁸⁹THOMANN, *supra* note 6, at 110.

⁹⁰Act of June 1, 1796, ch. 159, 1 Stat. 492 (1796); Act of March 3, 1797, ch. 11, 1 Stat. 504 (1797); Act of January 29, 1798, ch. 10, 1 Stat. 539 (1798).

⁹¹4 WRITINGS OF THOMAS JEFFERSON 112 (Andrew A. Lipscomb ed., 1903).

⁹²1 MESSAGES AND PAPERS OF THE PRESIDENTS 327-28 (James D. Richardson ed., 1899).

⁹³*See* RORABAUGH, *supra* note 8, at 55.

⁹⁴Ch. 19, 2 Stat. 148 (1802).

first excise tax on alcohol, along with all other internal taxes, came to an end.⁹⁵

In many ways, the tax on alcohol had been a failure. Evasion had been rampant, and the collection of taxes from a reluctant and scattered citizenry had proven to be difficult and hugely expensive. The total amount collected from 1792 to 1801 was \$3,675,818, a mere 5.1% of the total tax revenue (the majority of which came from import duties).⁹⁶ Not only were the costs of collection high, averaging twenty percent of the amount collected every year,⁹⁷ but the expedition to quell the Whisky Rebellion had cost a staggering \$1,223,251 to raise and supply- the equivalent of one-third of the total amount collected over the tax's ten years of operation.⁹⁸

In addition, the effect on consumption was negligible. While acknowledging that the failure of the tax had much to do with "economic reality," Rorabaugh argues that a deeper failing doomed the tax:

Americans in general hated the excise on domestic distilled spirits because it clashed with post-Revolutionary principles... The majority of Americans resented a measure that appeared to favor the rich who drank Madeira [wine] over the poor who drank whiskey. They condemned what they considered to be both an infringement of their freedom to drink and an effort on the part of government to control their customs and habits. Furthermore, in the 1790s a fierce republican pride caused most Americans to resist any attempt by the wealthy and powerful to set standards of morality and coerce the ordinary man to adopt them. The excise tax, aimed at curbing the use of distilled spirits, was seen as just such an attempt. And so the measure failed. As for the antiliquor reformers, they emerged from the wreckage of the whiskey tax controversy with neither a policy nor a program. They watched with bewilderment and apprehension as the postwar tide of liquor rolled onwards, engulfing America.⁹⁹

Hamilton's internal tax system, however, was an integral part of a remarkable decade-long economic achievement and an important precedent for the nascent federal government. By the time of Jefferson's ascension to

⁹⁵ *Id.* at 148.

⁹⁶ HU, *supra* note 24, at 30.

⁹⁷ JAN-WILLEM GERRITSEN, *THE CONTROL OF FUDDLE AND FLASH* 107 (2000).

⁹⁸ HU, *supra* note 24, at 30.

the presidency, Hamilton's system of taxation had succeeded so remarkably in stabilizing the once-precipitous finances of the nation that it was no longer necessary.¹⁰⁰ In addition, the Treasury Secretary had established the authority of the federal government to impose an internal tax upon the citizens of the United States. In a 1792 letter to Washington, Hamilton explained his fervent support for an excise tax, writing that it was crucial "to lay hold of so valuable a resource of revenue before it was generally preoccupied by the State governments...lest a total non-exercise of [federal authority] should beget an impression that it was never to be exercised, and, next, that it ought not to be exercised."¹⁰¹ By arranging the enactment of an internal tax on spirits- and by defending the enforcement of that tax against open rebellion- Hamilton established a crucial precedent.¹⁰² In short, Hamilton's excise tax on spirits laid the groundwork for all future federal taxes, not merely on alcohol, but on every imaginable commodity traded amongst the states.

III. THE WAR OF 1812 AND THE SECOND EXCISE

The fiscal policy that Jefferson and his successor Madison sought to implement was always implicitly, and sometimes explicitly, anti-Hamiltonian. Albert Gallatin, Secretary of the Treasury from 1801 to 1814 described the reasoning behind that policy in his Annual Report for 1808:

The geographical situation of the United States, their history since the Revolution, and, above all, present events, remove every apprehension of frequent wars. It may, therefore, be confidently expected that a revenue derived solely from duties on importations, though necessarily impaired by war, will always be amply sufficient, during long intervals of peace, not only to defray current expenses but also to reimburse the debt contracted during the few periods of war.¹⁰³

¹⁰⁰JOHNSON, *supra* note 1, at 78-79.

¹⁰¹4 WORKS OF ALEXANDER HAMILTON 438 (Henry C. Lodge ed., 1904).

¹⁰²*See* HU, *supra* note 24, at 29.

When Madison took office the following year, he retained Gallatin in his Cabinet, signifying an intention to continue the fiscal policies pursued over Jefferson's two terms, including the continued avoidance of internal taxation on alcohol or any other commodity.

The onset of war with Britain a mere ten years after the abolition of the excise tax, however, forced Gallatin to abandon his long-standing objection to internal taxation. Even before the war began, Gallatin had been sufficiently alarmed by the poor state of the federal Treasury to recommend to Congress that both direct taxes and excise taxes would be needed to prepare for the hostilities that had seemed imminent to many since the expiration of the Jay Treaty with England in 1807.¹⁰⁴ On January 10, 1812, he sent a letter to the House Ways and Means Committee informing its members, "There is not any more eligible object of internal taxation than ardent spirits."¹⁰⁵ In light of Gallatin's past, this was quite an ironic about-face: two decades earlier, Gallatin had been a driving force behind western Pennsylvania's opposition to Hamilton's tax on spirits and an active participant in the Whiskey Rebellion.¹⁰⁶

Gallatin's calls for an internal tax, however, went unheeded, and when war broke out on March 18, 1812, Congress was forced to scramble for funds. An act doubling the import duties was passed on July 1 of that year but did little to ease the financial crisis caused by the onset of war.¹⁰⁷ The enactment of a tax on spirits was forestalled by an inconvenient political situation: the war was supported only by the southern states, which were precisely where opposition to internal taxation ran deepest. The northeastern states opposed taxation for a war they did not endorse; the southern states simply opposed internal taxation under any

¹⁰⁴HU, *supra* note 24, at 33.

¹⁰⁵Letter from Albert Gallatin to Representative Ezekiel Bacon, Chairman of the House Committee on Ways and Means, January 10, 1812 (12th Cong., 1st Sess.), 2 AMERICAN STATE PAPERS: FINANCE 525 (1832).

¹⁰⁶See THOMANN, *supra* note 6, at 59, 95, 102-03, 106; RORABAUGH, *supra* note 8, at 54-56.

¹⁰⁷Act of July 1, 1812, ch. 112, 2 Stat. 768 (1812).

circumstances.¹⁰⁸ Nevertheless, by the summer of 1813, the need for additional funds was so acute that Gallatin was able to secure passage by the Republican Congress of a series of laws virtually reinstating in its entirety the system of internal taxation on distilled spirits that it had cast aside eleven years earlier.¹⁰⁹ A July 22 act re-established, with minor modifications, Hamilton's collection system;¹¹⁰ two days later Madison signed into law a measure requiring distillers to pay a license fee.¹¹¹ On August 2, Hamilton's old license fees were re-imposed on retailers of liquor and wine.¹¹²

Even these measures proved insufficient to fund the war, and in September of 1814, Madison was forced to call a special session of Congress to plead for more revenue.¹¹³ An act of December 21 of that year added an excise duty on distilled spirits to the license fees for distillers already in place,¹¹⁴ while an act signed two days later imposed an additional fifty-cent charge for retail licensees.¹¹⁵ Both acts became effective February 1, 1815- a mere sixteen days before the war came to an end.¹¹⁶

Whereas the debate over the first excise tax on alcohol had featured an undercurrent of moral concern and reformist enthusiasm for moderating the drinking habits of the population, the debates that led to the taxes and duties imposed to fund the War of 1812 were couched exclusively in economic terms. In the crisis situation created by the war, there was no talk of reducing consumption or improving the morals of the nation. Furthermore, widespread and copious distilling had come to be taken for granted as a natural byproduct of agriculture, and distilling was therefore targeted for taxation only out of a dire need for funds, rather than as the result of a moral crusade to promote temperance.¹¹⁷ It was understood by both Congress and the citizenry that the internal taxes on the manufacture and sale of alcohol were temporary responses

¹⁰⁸HU, *supra* note 24, at 33.

¹⁰⁹See THOMANN, *supra* note 6, at 135-37.

¹¹⁰Act of July 22, 1813, ch. 16, 3 Stat. 22 (1813).

¹¹¹Act of July 24, 1813, ch. 25, 3 Stat. 42 (1813).

¹¹²Act of August 2, 1813, ch. 39, 3 Stat. 72 (1813).

¹¹³HU, *supra* note 24, at 34.

¹¹⁴Act of December 21, 1814, ch. 15, 3 Stat. 152 (1814).

¹¹⁵Act of December 23, 1814, ch. 16, 3 Stat. 159 (1814).

¹¹⁶HU, *supra* note 24, at 34.

¹¹⁷See THOMANN, *supra* note 6, at 133-40.

to the exigencies of war and that repeal would follow as soon as circumstances would allow.¹¹⁸

As such, following the conclusion of the war Congress took immediate steps to dismantle the system of internal taxation.¹¹⁹ In his annual message to Congress for 1815, however, Secretary of the Treasury Alexander Dallas pleaded for the retention of the system of license fees for distillers and retailers of liquor.¹²⁰ Remarkably, this implicit but firm rejection of the Jeffersonian belief that import duties alone would be sufficient to fund the federal government succeeded, at least temporarily, in staying Congress from eliminating the wartime tax measures.¹²¹ In his first message to Congress in December of 1817, however, President James Monroe rejected the stance taken by Dallas, who was no longer serving as Treasury Secretary, and called upon Congress to abolish all internal taxes. He stated:

It appearing that the revenue arising from the imposts and tonnage, and from the sale of public lands, will be fully adequate to the support of the Civil Government, of [the army and navy], to the payment of the interests on the public debt, and to the extinguishment of it at the times authorized, without the aid of internal taxes, I consider my duty to recommend to Congress their repeal.¹²²

Congress obliged almost immediately, and three weeks later, on December 23, 1817, Monroe signed into law an act abolishing all internal duties.¹²³

IV. CONGRESS FALLS SILENT, THE COURT STEPS FORTH

¹¹⁸JOHNSON, *supra* note 1, at 81.

¹¹⁹*See* HU, *supra* note 24, at 35.

¹²⁰Report of Alexander Dallas to the Senate, December 8, 1815 (Annual Report of the Secretary of the Treasury) 3 AMERICAN STATE PAPERS: FINANCE 16-17 (1834). Dallas proposed that Congress discontinue duties on spirits, double the license fee charged to distillers, and retain the license fees for retailers after reducing them to the 1813 rates. *Id.*

¹²¹HU, *supra* note 24, at 35.

¹²³Ch. 1, 3 Stat. 401 (1817).

From December 31, 1817, the date on which the act of December 23rd took effect,¹²⁴ to August 1, 1862, the manufacture and sale of alcohol within the borders of the United States was neither regulated nor taxed in any manner by the federal government. Throughout that period Congress, following the policy set by Monroe in his first speech to Congress,¹²⁵ maintained a series of tariffs on imported wine and spirits that, while constantly varying in their particulars, consistently served to protect the domestic distilling industry from foreign competition.¹²⁶

Only twice over the course of these forty-five years of non-regulation did Congress consider the question of alcohol outside the context of managing the tariff rates. In 1826, the House considered a resolution to simultaneously “increase the duty on all imported spirits, and to levy an excise on domestic liquors.” The matter was referred to a select committee, which, after deliberating the matter, reported:

The committee... have no hesitation in expressing their opinion that no fairer subject of taxation and revenue can be presented to the Government than *ardent spirit*, whether *foreign* or domestic; and they would desire to see a larger portion of our revenues derived from this source. . . . Domestic liquors are made from various materials, and in every section of the country. They are *used* by the citizens of the United States to an extent which many believe to be incompatible with the public good, and perhaps the ratio is increasing beyond the ratio of population. The consequences are deeply felt, and are greatly to be deplored by every friend of man. The question presented is not whether, by sumptuary laws, we will prohibit intoxication; but whether intoxicating liquor is not a fair and lawful subject of taxation, from which the Government may draw its revenues to pay the public debt, to distribute widely the blessing of *free schools*, and improve the internal position of our country? And if, by the imposition of such tax, the consumption of ardent spirits is diminished, will not the public morals, the comfort and happiness of the community, the wealth and character of the nation be advanced?¹²⁷

This report,¹²⁸ featuring arguments regarding temperance strikingly similar to those set forth by Hamilton

¹²⁴*Id.* at 401.

¹²⁵Monroe’s plea to Congress urging the abandonment of internal taxes was directly linked to his Protectionist view on tariffs, which he believed should be high enough to “encourage” domestic industries. In his December 2, 1817 speech, he noted, “Our manufactures will require the continued attention of Congress. . . . Their preservation, which depends on due encouragement, is connected with the highest interests of the nation.” 2 MESSAGES AND PAPERS OF THE PRESIDENTS 18 (James D. Richardson ed., 1896).

¹²⁶See THOMANN, *supra* note 6, at 158, 178; JOHNSON, *supra* note 1, at 83-84.

¹²⁸*Id.* at 506-21.

and his allies decades earlier,¹²⁹ went nowhere, however, and Congress continued to rely exclusively on an import duty on foreign spirits for revenue, thus allowing domestic spirits to be sold without any federal tax. Such a system, of course, encouraged the consumption of domestic over foreign spirits but did nothing to promote temperance.

Congress's only other nod to temperance during this period was an 1832 act significantly reducing tariff duties on all varieties of wine.¹³⁰ Until 1819, when chemist William Brande published findings to the contrary, most Americans had believed that wine contained no alcohol whatsoever.¹³¹ Even after Brande dispelled this myth, many Americans, especially in the upper classes, believed that wine was far preferable to spirits as a drink for the masses. Jefferson himself had stated, "No nation is drunken, where wine is cheap; and none sober, where the dearness of wine substitutes ardent spirits as the common beverage."¹³² The lower tariff resulted in a slight increase in consumption of wine among Americans, approximately three-tenths of a gallon annually per person.¹³³ It did not, however, result in a decrease in drunkenness. Once the wine, which was mixed with alcohol by its European producers in order to preserve it during the trip across the Atlantic, reached America, retailers increased their profit margins by further adulterating it with spirits and water.¹³⁴ The resulting product consisted of twenty to thirty percent alcohol, which was far greater than the natural alcohol content of the wine.¹³⁵ This practice of "fortifying" the Madeira wine that was imported from Europe was so common that it is estimated that the amount of adulterated Madeira Americans consumed outnumbered the amount of pure Madeira imported by a ratio of five to one.¹³⁶ As a result, wine eventually fell out of favor with temperance activists both as a substitute for distilled spirits

¹²⁹See *supra* note 37 and accompanying text.

¹³⁰Act of July 14, 1832, ch. 227, 4 Stat. 583, 589-90 (1832).

¹³¹RORABAUGH, *supra* note 8, at 101.

¹³²Letter from Thomas Jefferson to Monsieur de Neuville (December 13, 1818), in JEFFERSON AND WINE, at 185 (R. de Treville Lawrence ed., 1976)

¹³³RORABAUGH, *supra* note 8, at 106.

¹³⁴*Id.*

¹³⁵*Id.*

¹³⁶*Id.*

among the working class and as the drink of choice among the generally upper-class activists themselves, who increasingly concluded that it was hypocritical on their part to “deprive the laboring man of his drink” while continuing to enjoy intoxicating beverages on their own.¹³⁷ By the 1840s, the national consumption of wine had fallen precipitously.¹³⁸

Over the course of the long period of congressional near-silence on alcohol, an ever-growing grass-roots temperance movement had resulted in a swell of prohibition laws in the states and a delicate constitutional question that drew the Supreme Court into the controversial realm of alcohol regulation.¹³⁹ The prelude for the Supreme Court’s jurisprudence regarding the constitutional implications of state prohibition laws was the 1827 case of *Brown v. State of Maryland*,¹⁴⁰ in which it ruled unconstitutional a Maryland law requiring importers and wholesalers “of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey and other distilled spirituous liquors” to purchase a license from the state.¹⁴¹ In his opinion for the Court, Chief Justice John Marshall held that Maryland’s act was in direct conflict with both the Commerce Clause of the Constitution and that document’s dictate that “no State shall lay and impost or duties on imports or exports,” and was thus invalid.¹⁴² Marshall additionally found that the right to sell was “an inseparable incident” of the right to import,¹⁴³ and that therefore so long as a merchant had acquired from Congress the right to import an item, he had the right to sell that item in its original packaging (that is, if he did not break up the imported item in such a way as to mix it “with the general property of the State”) regardless of any state or local laws to the contrary.¹⁴⁴

The Court’s ruling that state laws restricting foreign commerce were unconstitutional raised the question of

¹³⁷*Id.*

¹³⁸*Id.*

¹³⁹*See generally* JOHNSON, *supra* note 1, at 46-47.

¹⁴⁰25 U.S. 419 (1827).

¹⁴¹*Id.* at 419-20.

¹⁴²*Id.* at 445, 447-49.

¹⁴³*Id.* at 448.

¹⁴⁴*Id.* at 443.

whether state laws restricting commerce between the states would meet the same fate. The Chief Justice seemed to indicate that it would, noting, “It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister State.”¹⁴⁵ The passage, however, was clearly dictum, and the question, for the time being, was left unanswered.

The question left open by *Brown v. Maryland* was finally answered in the negative twenty years later in a trio of cases that came to be known collectively as *The License Cases*.¹⁴⁶ In a single opinion addressing all three cases, Chief Justice Roger Taney, while acknowledging that any act by Congress addressing the issue would prevail over a state law to the contrary, held that in the absence of congressional action, the police power of the states allowed them to regulate, and even prohibit, the importation of alcohol from sister states:

Although the gin sold was an import from another State, and Congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet, as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue.¹⁴⁷

In a bewildering series of opinions (a total of nine, authored by six of the seven justices), the Court concurred unanimously with Taney’s basic point. Justice Grier’s impassioned concurrence denied that the Commerce Clause was relevant to the cases at all, arguing that the police power was sufficient to decide the matter in an opinion that betrayed his sympathy for the cause of temperance:

¹⁴⁵*Id.* at 449.

¹⁴⁶46 U.S. 504 (1847). The three cases were *Thurlow v. Massachusetts*, *Fletcher v. Rhode Island*, and *Pierce v. New Hampshire*. *Id.* at 504.

[T]he true question presented by these cases, and one which I am not disposed to evade, is, whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. I do not consider the question of the exclusiveness of the power of Congress to regulate commerce as necessarily connected with the decision of this point. . . . It is not necessary for the sake of justifying the State legislation now under consideration to array the appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power, or of legislation, as between the States and the United States; each is acting within its sphere, and for the public good, and if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousandfold in the health, wealth, and happiness of the people.¹⁴⁸

The effect of this ruling on a constitutional level was profound. The opinions in *The License Cases* negated the Marshall Court's previous attempts to clarify the effect of the Commerce Clause on states' abilities to enact their own laws regulating interstate commerce.¹⁴⁹ Under Marshall, the Court had taken the first steps towards establishing and interpreting what has since come to be known as the "dormant" Commerce Clause. As it has subsequently developed, the dormant Commerce Clause has been used by the Supreme Court to invalidate state legislation negatively affecting interstate commerce in a given area even in the absence of congressional action in that area, based on the assumption that the Constitution's delegation to Congress of the power to regulate commerce among the states implies a denial of power to the states to enact legislation that has a protectionist or discriminatory effect on interstate commerce.¹⁵⁰ In their casebook on constitutional law, Gerald Gunther and Kathleen Sullivan explain, "After Marshall's death in 1835, the Court, under [Taney], searched for formulations of the negative implications of the commerce clause with little clarity or agreement."¹⁵¹ *The License Cases* was an important development en route to the Taney Court's eventual agreement four years later on a single standard in *Cooley v. Board of Wardens*.¹⁵² In that case, the Court held that the Commerce Clause of the Constitution merely limited, rather than barred, state

¹⁴⁹ See, e.g., *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829).

¹⁵⁰ GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 259 (13th ed., 1997)

¹⁵¹ *Id.* at 264.

¹⁵² 53 U.S. 299 (1851).

regulation of foreign and interstate commerce. Justice Benjamin Curtis's opinion in *Cooley* drew a distinction based on the "subject" of the legislation involved, holding that some subjects were "national," requiring a "single uniform rule" set by Congress, and others "local," not only allowing, but in fact "imperatively demanding" that states be allowed to regulate the subject in order to "meet the local necessities."¹⁵³

The holding in *The License Cases*, as neatly confirmed by *Cooley*'s national-local distinction,¹⁵⁴ allowed statewide prohibition laws to flourish. Marshall's dicta in *Brown v. Maryland* had raised the specter of such laws being rendered unworkable and irrelevant. If, as Marshall had implied, the constitutional proscription on state laws barring merchants from importing items from abroad and selling them in their original packaging extended to laws relating to the importation of items from state to state, state prohibitory laws would be weakened to the point of irrelevancy. As an example, if Massachusetts placed an absolute ban on the manufacture or sale of alcohol within its borders but was constitutionally required to allow its merchants to import and sell Connecticut spirits, the purpose of the prohibitory laws- temperance- would be utterly thwarted. So long as some Massachusetts residents wished to enjoy intoxicating beverages,¹⁵⁵ all that the law would accomplish would be the enrichment of out-of-state distillers and retailers at the expense of Massachusetts citizens. Although *The License Cases* would eventually be overruled,¹⁵⁶ for the time being, the door had been opened for effective state prohibitory laws. The decision in that case ensured that 'dry' states would not be inundated by a steady supply of alcohol from outside their borders. By 1855, fourteen states had passed laws restricting or prohibiting the manufacture and sale of intoxicating beverages.¹⁵⁷

¹⁵³*Id.* at 319.

¹⁵⁴Since Congress had remained utterly silent on the issue of alcohol regulation outside of tariff policy since 1817 while states varied widely in their positions, it appeared logical to deem the decision of whether or not to allow the manufacture and sale of alcohol a "local," rather than a "national," question.

¹⁵⁵Harvard Law School was founded in 1817; it therefore stands to reason that at the midpoint of the nineteenth century there was at least one locus of drinking activity in the state.

¹⁵⁶See *infra* notes 250-254 and accompanying text.

¹⁵⁷JOHNSON, *supra* note 1, at 84.

Notwithstanding the enactment of prohibitory laws in several states, however, a combination of years of high tariffs and benign congressional inattention towards the domestic intoxicating beverages trade caused the alcohol industry to flourish. By the time Congress finally imposed a significant reduction on tariffs in 1857,¹⁵⁸ the domestic alcoholic beverages industry had enjoyed decades of growth unimpeded by federal taxation and decisively aided by an avowedly protectionist tariff system, and had enjoyed tremendous growth and profitability throughout the non-prohibition states. The combination of a staggeringly high volume of production and miniscule production costs created a situation in which distillers were able to maintain high profit margins while selling their products at affordable, untaxed prices. As a result, according to David A. Wells, who would later serve as the Chairman of a Special Commission on Internal Revenue appointed by Congress in 1865,¹⁵⁹ “In short, previous to 1860 a man could undoubtedly get drunk in the United States with a less expenditure of money than in any part of the civilized world.”¹⁶⁰

V. THE CIVIL WAR

The onset of the Civil War led to a need for revenue such as the young nation had never experienced, dramatically changing the federal government’s role in regulating the manufacture and sale of intoxicating beverages. On July 4, 1861, Secretary of the Treasury Salmon P. Chase reported to Congress that from June 30, 1860 to June 30, 1861, the government had taken in a total of \$86,972,893 (over half of which came from Treasury Notes and loans rather than from revenue obtained through import duties) and had

¹⁵⁸ Act of March 3, 1857, ch. 98, 11 Stat. 192 (1857).

¹⁵⁹ See *infra* note 182 and accompanying text.

¹⁶⁰ DAVID A. WELLS, PRACTICAL ECONOMICS 163 (1865).

spent \$84,577,258. This left the Treasury with a grand total of \$2,395,635 on hand to fund a government that Chase estimated would need \$318,519,581 for the next year alone.¹⁶¹ Congress, however, hesitated to reinstate an excise tax on alcoholic beverages, instead raising the tariff on wine, spirits, and other imports and imposing a tax on land as well as the nation's first income tax.¹⁶² In December 1861 report, Chase indicated that the estimated deficit for the fiscal year would be \$213,904,497. Believing, however, that "the war may be brought to an auspicious termination before midsummer [1862]," he merely called for Congress to obtain loans and increase the current tariff and tax rates.¹⁶³

The new year, however, brought not a speedy end to the war but instead an increasing realization that the struggle to preserve the Union would be long, arduous, and expensive. In response, the House Committee on Ways and Means conducted hearings in order to ascertain from the leaders of various industries what levels of taxation they could bear,¹⁶⁴ their objective being to tax as many items as possible at as high a rate as possible in order to satisfy the nation's desperate need for revenue.¹⁶⁵ On March 12, 1862, upon introducing to the House the bill that resulted from the Committee's deliberations, Representative Anson P. Morrill of Maine explained its proposed duties on alcohol in both pragmatic and moral terms:

The duties proposed by the present bill rest heavily on spirits and malt liquors- being about one hundred per cent on raw whiskey, fifty per cent on rum, and twenty-five per cent, on ale or beer- but far below the point at which even some prominent distillers thought they might be safely carried, and yet largely above the point indicated by those engaged in the business. . . . Much the largest quantity of spirit produced in this country is from corn, and many persons apprehend, that we shall cut them up by the roots with a duty so high as even fifteen cents per gallon, and that great injury will result to farming interests thereby. The committee were satisfied these fears are not well founded. So long as consumption keeps equal pace with production- as in the case of all manufactures- the consumer must pay the increased cost price. The consumption will not be seriously checked; and, if it could be, such a result would bring us no national disgrace. Whiskey and rum, with the duty added, will still leave it possible for any man or brute to get drunk in our land on cheaper terms than in any other that I know of.¹⁶⁶

¹⁶¹ CONG. GLOBE, 37th Cong., 1st Sess., Appendix 4 (1861).

¹⁶² Act of August 5, 1861, ch. 45, 12 Stat. 292 (1861).

¹⁶³ CONG. GLOBE, 37th Cong., 2nd Sess., Appendix 25 (1861).

¹⁶⁴ THOMANN, *supra* note 6, at 200.

¹⁶⁵ JOHNSON, *supra* note 1, at 84.

Nine days later, Morrill, who had left the Democratic Party in 1853 when it opposed prohibition in Maine,¹⁶⁷ elaborated his moral stance, stating:

If you make this tax so high as to prohibit the traffic, which it does not propose to do, you can do no more valuable service to your country. I would make the tax so high that no wholesaler or retailer could be found in the land, if it were practicable. If you would do that, if you could entirely stop the use of intoxicating drinks and the war rage on, your country would suffer less by the war than it has and does from the use of intoxicating liquors.”¹⁶⁸

Despite a general acceptance of the need to tax everything possible to fund the war, the proposed duties on alcohol elicited objection from a surprising source- the prohibitionists. The existence of state prohibition laws created an awkward dilemma for the representatives of prohibition states when Congress took up the debate on Morrill’s revenue bill. By licensing the sale of alcohol, Congress could be seen to be endorsing it, a thought that was utterly repugnant to a number of senators and representatives.¹⁶⁹ Senator Henry Wilson of Massachusetts, for example, moved to eliminate the entire section of the bill licensing liquor retailers, explaining:

I do not think any man in this country should have a license from the Federal government to sell intoxicating liquors. I look upon the liquor trade as grossly immoral, causing more evil than anything else in this country, and I think the Federal government ought not to derive a revenue from the retail of intoxicating drinks. . . . The man who has paid the Federal government twenty dollars for a license to retail ardent spirits will feel that he is acting under the authority of the Federal government, and that any regulations, state or municipal, interfering with him, are mere temporary and local arrangements, that should yield to the authority of the Federal government. Sir, I hope the Congress of the United States is not to put upon the statute book of this country a law by which tens of thousands of persons in this country who are dealing out ardent spirits to the destruction of the health and life of hundreds of thousands and the morals of the nation, are to be raised to a respectable position by paying the Federal government twenty dollars for a license to do so.¹⁷⁰

Senator Wilson and his allies were finally mollified by assurances that the bill was merely a temporary measure intended to address the exigencies of war and by the inclusion of a compromise passage in the final version of the bill. That passage read:

¹⁶⁷JOHNSON, *supra* note 1, at 85.

¹⁶⁹JOHNSON, *supra* note 1, at 85.

That no license hereinbefore provided for, if granted, shall be construed to authorize the commencement or continuation of any trade, business, occupation, or employment therein mentioned, within any state or territory in which it shall be specially prohibited by the laws thereof, or in violation of the laws of any state.¹⁷¹

This was an odd compromise, especially in light of the fact that the previous two excises on spirits had explicitly barred the granting of federal retail licenses in states where the sale of alcohol was illegal.¹⁷² The 1862 provision, which implied that the federal government could collect a license fee from enterprises that were illegal under state law, is best understood in light of the change in circumstances since the enactment of the prior two excises on alcohol. During the Civil War era, unlike in 1794 and 1813, the United States had a number of states attempting- and failing- to enforce prohibition within their borders. As reluctantly admitted by a number of representatives from prohibition states, despite state laws barring the retail sale of alcohol, such sales took place on a regular basis.¹⁷³ Not to charge a licensing fee to such retailers would not only have deprived the revenue-starved government of a ready source of income but would have created the anomalous situation of alcohol being tax-free, and thus less expensive, in prohibition states than in non-prohibition states.¹⁷⁴ Under the circumstances, federal taxation on illegal state alcohol sales may have

¹⁷²The act of June 5, 1794 granted licenses “*Provided always*, That no license shall be granted to any person to sell wines or foreign distilled spirituous liquors, who is prohibited to sell the same by the laws of any state,” Ch. 48, 1 Stat. 376, 378 (1794) (emphasis in original), while the act of August 2, 1813 granted them “*Provided always*, That no license shall be granted to any person to sell wines, distilled spirituous liquors, or merchandise, as aforesaid who is prohibited to sell the same by any state.” Ch. 39, 3 Stat. 72, 73 (1813) (emphasis in original).

¹⁷³See THOMANN, *supra* note 6, at 207-10.

¹⁷⁴In the years to come, the collection of federal license fees (later explicitly renamed taxes by Congress) would create conflict with state laws. An 1872 federal law required revenue collectors to keep a list of those who paid the retail liquor tax in their offices, while a number of state laws provided that the payment of the tax was *prima facie* evidence that an individual was selling spirits. This led to the regular subpoenaing of revenue collectors to testify against alleged liquor retailers in state courts. This practice came to be so common that in 1896, in order to protect taxpayers’ privacy and to eliminate the extensive time commitment required by state court appearances, the Secretary of the Treasury established a regulation barring tax collectors from divulging private citizens’ tax information to the states. The ruling came to help distillers, as well as retailers, at the expense of the states. Since the federal government only taxed spirits when they were withdrawn from bonded warehouses after an aging period (*see infra*, notes 291-293 and accompanying text), the ruling barring federal revenue officials from divulging tax information, including their information on what was inside the warehouses, meant that state governments would have to accept the distillers’ word when valuing their warehouse stocks for tax purposes. JOHNSON, *supra* note 1, at 90-93. The ruling was eventually challenged in federal courts and was upheld by the Supreme Court. *Boske v. Comingore*, 177 U.S. 459, 469-70 (1900) (“In our opinion the Secretary [of the Treasury], under the regulations as to the custody, use and preservation of the records, papers and property appertaining to the business of his Department, may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character.”) The fact that the 1896 Treasury regulation barred only the sharing of taxpayer information with states, not other federal agencies, led to an interesting set of interactions within the executive branch. In 1895, Congress passed a law forbidding the sale of liquor in the Indian Territory that would ultimately

appeared to be the lesser of two evils.

With this compromise in place, the bill was passed and signed into law on July 1, 1862.¹⁷⁵ It imposed a tax of twenty cents per proof gallon¹⁷⁶ as well as license fees for distillers, brewers, wholesale dealers, and retail dealers.¹⁷⁷ As the war continued and the need for revenue became greater, the tax on spirits, which came into effect on August 1, 1862,¹⁷⁸ was increased to sixty cents per gallon by an act of March 7, 1864.¹⁷⁹ An act of July 30, 1864¹⁸⁰ imposed both an immediate increase to \$1.50 and a subsequent raise, seven months later, to \$2 per gallon.¹⁸¹

VI. THE SPECIAL COMMISSION AND THE 1868 REFORMS

As the war drew to a close, Congress appointed a Special Commission, chaired by respected scholar David A. Wells,¹⁸² to examine the internal revenue measures that had been enacted over the course of the conflict and to issue recommendations as to how to revise the system.¹⁸³ The Commission's report was delivered to

become the state of Oklahoma. The taxation of liquor retailers continued to take place within the Territory, however, leading to a rather awkward situation in which the Treasury Department would tax individuals retailing in violation of federal law and the Justice Department would obtain Treasury records to use as evidence of that taxation to convict the same individuals for violating that law. *Id.* at 95-96.

¹⁷⁵Ch. 119, 12 Stat. 432 (1862).

¹⁷⁶*Id.* at 447. The tax was essentially based on a beverage's alcohol content: a gallon of one hundred proof whisky equaled a proof gallon and was taxed at twenty cents, whereas it would take five gallons of a twenty proof liquor to equal one proof gallon. *See* Hu, *supra* note 24, at 37.

¹⁷⁷12 Stat. at 446.

¹⁷⁸*Id.* at 447.

¹⁷⁹Ch. 20, 13 Stat. 14, 14 (1864).

¹⁸⁰Ch. 173, 13 Stat. 223 (1864).

¹⁸¹*Id.* at 243. The increase to a \$2 duty was originally scheduled for February 1, 1865; an act of December 22, 1864 struck the word "February" from the relevant portions of the June 30 act and replaced it with a new effective date of January 1, 1865. Act of December 22, 1864, ch. 8, 13 Stat. 420 (1864).

¹⁸²*See infra*, note 159 and accompanying text.

¹⁸³Act of March 3, 1865, ch. 78, 13 Stat. 469, 487 (1865).

Congress on January 29, 1866,¹⁸⁴ and along with Commissioner Wells' subsequent writings on the subject, form a comprehensive and invaluable set of resources to assess the state of federal regulation of alcoholic beverages following the radical changes of the Civil War.

The Commission reported that despite the pronounced and rapid increases in the tax on spirits, consumption apparently fell little. The poor had turned to "the cheapest and worst class of spirits," that is, adulterated spirits.¹⁸⁵ The well-to-do, on the other hand, had displayed a remarkable willingness throughout the war to buy the wine and spirits they desired. The Commission, noting the lack of evidence that consumption by the wealthy decreased at all, wryly observed, "there are no people less inclined to regard expense in the gratification of their desires and appetites than the Americans."¹⁸⁶

The Commission therefore encouraged the continuance of a tax on spirits, invoking the combination of moral and practical considerations that had marked discussion of the topic since Hamilton's time:

That distilled spirits *ought* to contribute a very large proportion of the amount which the necessities of the country require shall be annually raised by internal taxation is, we believe, the almost unanimous sentiment of the whole country. It may, indeed, be considered as an axiom in political economy, that there is no article which creates a fairer subject for excise, and none which can be made to produce so much revenue with so little suffering to the taxpayer. . . . That distilled spirits *can*, furthermore, without detriment to any business interests of the country, be made to yield a revenue sufficiently large to lighten the burden on almost every other branch of industry, is an assertion that seems to scarcely need proof to substantiate.¹⁸⁷

Despite the Commission's confident assertion that taxes on spirits ought to and could be collected, it was not as sanguine about the federal government's performance in actually collecting those funds during the Civil War. The Commission first found fault with a major loophole in the revenue system that served to

¹⁸⁴REPORTS OF A COMMISSION APPOINTED FOR A REVISION OF THE REVENUE SYSTEM OF THE UNITED STATES, 1865-66 (1866) [hereinafter "SPECIAL COMMISSION REPORT"].

¹⁸⁵SPECIAL COMMISSION REPORT, *supra* note 184, at 179. See HU, *supra* note 24, at 40.

¹⁸⁶SPECIAL COMMISSION REPORT, *supra* note 184, at 179. The use of alcohol for non-beverage purposes (e.g., in industry and in the manufacture of vinegar), however, fell precipitously. See generally *id.*, 161-65; HU, *supra* note 24, at 38-39.

enrich distillers at the expense of the government. In early 1862, when the House Committee on Ways and Means had interviewed industry representatives to ascertain proper tax levels,¹⁸⁸ distillers, aware that in the past intoxicating beverages had been Congress's very first target in times of fiscal crisis, enthusiastically supported taxation in a seeming display of patriotism. In voicing their support, they merely requested that any tax contemplated be laid on future production only, exempting existing stock from the tax. At the time, Senator John Sherman of Ohio objected vehemently, stating:

It has been known ever since last July that a tax would be put on whisky, and all the distillers of the country have been running to their extremist capacity, and today they are running more than they have ever done before. Every old still in the country has been set at work, simply because it was supposed that a tax would be put on whisky, and that the stock on hand would not be taxed.¹⁸⁹

Congress ignored Sherman's warnings, thus presenting the distillers with a series of opportunities to make spectacular profits. Before the introduction of the tax and each of the tax increases, distillers would increase production to the highest possible level, building up their stocks in anticipation. Once the tax or increase was passed, they would sell their old stocks, taxed at the old level, at a price that reflected the level of current taxation. This could result in quite a hefty profit; for example, selling spirits on which they paid a sixty cent tax at a price reflecting the rate of taxation of \$1.50 for current production meant an extra ninety cents per gallon in the pocket of the distiller.¹⁹⁰ The Commission was harshly critical of this practice:

The immediate effect of the enactment of the first three and successive rates of duty was to cause an almost entire suspension of the business of distilling which was resumed again with great activity as soon as an advance in the rate of tax in each instance became probable. The stock of whiskey and high-wines accumulated in the country was without precedent; and Congress, by its refusal to make the advance in taxation, in any instance, retroactive, virtually legislated for the benefit of distillers and speculators rather than for the treasury and the government. The profits realized by the holders of stocks, thus made in anticipation of the advance in taxation, has probably no parallel in the history of any similar speculation or commercial transactions in this county, and cannot be estimated at less than fifty millions of dollars.¹⁹¹

¹⁸⁸ See *supra* notes 164-165 and accompanying text.

¹⁹⁰ JOHNSON, *supra* note 1, at 103.

Writing twenty years later, Wells revised his appraisal upwards, estimating that between the institution of the tax on July 1, 1862 and its increase to the rate to \$2 a gallon on January 1, 1865, “distillers, dealers, [and] speculators” made a profit of approximately one million dollars simply from manipulating the system of rate increases in their favor.¹⁹²

Another source of criticism by the Commission was the ease and prevalence of fraud and tax evasion. For the fiscal year of 1863, ending June 30, when the tax was twenty cents a gallon, the government collected \$3,229,991 from 16,149,953 tax-paid gallons. In fiscal 1864, during which the tax rose to sixty cents, it collected \$28,431,798 off of 85,295,392 gallons. In fiscal 1865, however, despite the jump to a \$1.50 and then \$2 tax, the figures plummeted to \$15,031,456 and 9,212,111 gallons.¹⁹³ In light of the Commission’s findings that consumption stayed steady throughout the war, the huge drop in reported production indicated incredibly widespread fraud and evasion. As the Commission noted, with an average cost of production of whisky at the time ranging from seventeen to twenty-four cents, and the tax initially set at twenty cents per gallon, “the premium offered for the evasion of the law is about one hundred percent.”¹⁹⁴ When the tax rose to \$2, the evasion premium rose to a staggering range of *eight hundred to twelve hundred* percent.¹⁹⁵ The profit margin for producers who sold their product at market prices reflecting the high taxes but then failed to actually pay the tax was therefore tremendous. The result was a system that yielded, in the years 1866 and 1867, about fifteen million reported gallons a year against an estimated annual production of forty-two to forty-five million gallons.¹⁹⁶

The Commission assailed Congress for its failure to address the fraud directly or to give the Secretary of

¹⁹²WELLS, *supra* note 160, at 198.

¹⁹³HU, *supra* note 24, at 40.

¹⁹⁴SPECIAL COMMISSION REPORT, *supra* note 184, at 180.

¹⁹⁵HU, *supra* note 24, at 42.

¹⁹⁶SPECIAL COMMISSION REPORT, *supra* note 184, at 172. See HU, *supra* note 24, at 42.

the Treasury or the Commissioner of Internal Revenue the power to do so.¹⁹⁷ Although Congress had authorized the hiring of a trio of detectives in 1863 to investigate the collection of the spirits excise, little progress was made.¹⁹⁸ The Commission's report to Congress contained a laundry list of failures in oversight: inspections of proof made by taste, rather than by the use of instruments; barrels 'inspected' and branded days *before* they were filled with the product that was supposed to be inspected; and "distillers or their workmen...not unfrequently" serving as inspectors in their own distilleries.¹⁹⁹ The Commission's report continued with damning excerpts from the testimony of four revenue agents, one of whom noted, "There never has been any officer appointed under the revenue act, whose special duty it was to look after distillers." Rather, he explained, the system was comprised of independent inspectors collecting small fees for quick, easy inspections:

In most cases all the inspectors ever thought of doing was, to go and inspect the liquors when the distillers sent for them. Whatever barrels of liquor happened to be ready, they inspected and then went away. I have heard of cases where *barrels were inspected and marked in advance of being filled*.²⁰⁰

The Commission's suggestions for change were based on a combination of pragmatism and their assessment of both public opinion and the general mood among the members of Congress. In opening the section of its report addressing the excise on alcohol, the Commission explained:

In respect to distilled spirits, the commission, taking as their guide the history of past congressional legislation, and what seems to them to be the general public sentiment of the country, assume in the outset that it is to be the future policy of the government to impose upon those articles the maximum imposts which they can bear, without too largely encouraging attempts at evasion of payment by the smuggler, the illicit distiller, and the retailer.²⁰¹

¹⁹⁷SPECIAL COMMISSION REPORT, *supra* note 184, at 174.

¹⁹⁸Act of March 3, 1863, ch. 74, 12 Stat. 713, 727 (1863); *see* MOORE, *supra* note 99, at 17.

¹⁹⁹SPECIAL COMMISSION REPORT, *supra* note 184, at 174. The commissioners concluded the list in disgust with the statement that "at least one case is known to the commission where the assessor, or inspecting officer, apparently did not possess sufficient intelligence to understand and correctly use an hydrometer," apparently a cardinal sin for a revenue official of the time. *Id.*

The Commission therefore recommended reducing the tax on proof gallons from \$2 to \$1 in order to encourage compliance.²⁰² It also impressed upon Congress the importance of establishing a system of revenue collection that was both viable and well-staffed.²⁰³

In 1868, drawing upon the Special Commission's report as well as on prior systems of excise taxes on intoxicating beverages both in the United States and in European countries, the Fortieth Congress passed a comprehensive measure revising the system of collecting revenue from the production and sale of alcohol that would stand, with minor modifications, until Prohibition.²⁰⁴ Although following the Civil War Congress had repealed most of the emergency revenue measures enacted over the course of the conflict, a consensus prevailed that the indirect excise taxes on alcohol (as well as those on tobacco) should be retained to meet the nation's need for revenue beyond that which was provided by import taxes.²⁰⁵ The Commission's findings had made it clear that changes in the structure of those taxes would be required if they were to be retained as a permanent revenue measure, and the 1868 legislation was Congress' acknowledgment that after decades of noninvolvement in the regulation of domestically produced intoxicating beverages and five years of a clumsy, inefficient tax, it had reached the same conclusion.

The new act lowered the tax on distilled spirits from \$2 to fifty cents per gallon²⁰⁶ and established a system of adhesive stamps to indicate payment of the tax.²⁰⁷ Most importantly, Congress replaced the ad hoc collection system of the past with a finely detailed program of strict regulations and thorough inspections to be conducted by a team of revenue officers entrusted with an unprecedented amount of authority. The act, for example, not only made it lawful "for any revenue officer, at all times, as well by night as by day, to enter

²⁰²SPECIAL COMMISSION REPORT, *supra* note 184, at 180-81.

²⁰³*Id.* at 180, 193-94.

²⁰⁴Act of July 20, 1868, ch. 186, 15 Stat. 125 (1868).

²⁰⁵GERRITSEN, *supra* note 97, at 107.

²⁰⁶15 Stat. at 125.

²⁰⁷*Id.* at 134-38.

into any distillery, or building, or place, used for the business of distilling, or in connection therewith”²⁰⁸ but also gave inspectors full authority “to break up the ground” at distilleries to search for contraband.²⁰⁹

VII. CORRUPTION, COOPERATION, AND THE COMMERCE CLAUSE

The passage of the 1868 act was not an immediate panacea. Although the lowered duty encouraged compliance by making illicit production worth neither the cost of evasion nor the risk of capture, nostalgia on the part of the distillers for the incredible profits they had made during the war led to agitation for a higher rate of tax.²¹⁰ In this campaign they were joined by unlikely allies from within the temperance movement who believed that higher taxes on distilled spirits were the key to reducing consumption.²¹¹ On June 6, 1872, the tax was raised to seventy cents per gallon,²¹² while on March 3, 1875, an additional jump was made to ninety cents per gallon.²¹³ On both occasions, stock on hand was exempted from the new rate, resulting once again in huge profits for the many distillers who had the prescience to hoard their stocks in anticipation of the raise.²¹⁴

The distillers, however, were not the only ones profiting from the windfall. In 1875, Secretary of the Treasury Benjamin H. Bristow exposed a vast national scandal, encompassing distillers, revenue officials, and Republican politicians. The “Whiskey Ring,” as it came to be called, originated with the use of revenue officials to raise money for campaign funds by accepting bribes from distillers in lieu of the taxes they had been sent

²⁰⁸*Id.* at 139.

²⁰⁹*Id.* at 140.

²¹⁰HU, *supra* note 24, at 45.

²¹¹*Id.*

²¹²Act of June 6, 1872, ch. 315, 17 Stat. 230 (1872).

²¹³Act of March 3, 1875, ch. 125, 18 Stat. 339 (1872).

²¹⁴HU, *supra* note 24, at 45.

to collect. In theory, distillers paid less than the amount called for by the tax, revenue officials kept their patronage jobs by passing the funds upwards, and their politically appointed superiors used the funds to ensure that the politicians who had appointed them stayed in office. In practice, however, the St. Louis-based operation quickly became a nationwide racket, expanding to Milwaukee, Chicago, Peoria, Cincinnati, New Orleans, and even Washington, D.C and serving as nothing more than an opportunity for graft on all levels of government and the liquor industry. The corruption was as meticulous as it was widespread, with proceeds shared according to a fixed price list. By the time Bristow finished his investigation, 152 members of the liquor industry and eighty-six government officials had been indicted, including the Treasury Department's supervisor of internal revenue for the St. Louis area, a former chief clerk of the Treasury Department, and President Ulysses S. Grant's personal secretary. It is estimated that in St. Louis alone, the government was defrauded out of \$1,200,000.²¹⁵

The Whiskey Ring had been an overwhelming scandal for the federal government, but its dismantling provided a tremendous opportunity for reform. The exposure of such widespread corruption within the civil service led to reforms that, in turn, resulted in an increased level of competence and professionalism among the men collecting the tax on distilled spirits. In 1876, Grant appointed former Union general Green B. Raum as the Commissioner of the Office of Internal Revenue.²¹⁶ Raum proceeded to rebuild an organization tainted by scandal by hiring a variety of individuals, from lawyers to shop clerks, who helped the revenue service gain an unprecedented level of respect.²¹⁷

More importantly, however, the collapse of the conspiracy created an urgent need on the part of the liquor industry to repair its sullied reputation, which finally convinced distillers and liquor retailers that it was far

²¹⁵See generally *Id.* at 45-6; WELLS, *supra* note 160, at 220-29.

²¹⁶MOORE, *supra* note 99, at 18. The Office of Internal Revenue was the name of the organization established to collect the new internal excise tax by the act of July 1, 1862. It was Raum who coined the term "Bureau of Internal Revenue," which he used in his annual report to Congress for 1877. The name stuck until 1952, when Congress renamed the entity the Internal Revenue Service. A HISTORICAL GUIDE TO THE U.S. GOVERNMENT 40 (George Thomas Kurian ed., 1998).

²¹⁷MOORE, *supra* note 99, at 20.

more in their interests to cooperate with the government than to continue to defraud it. Even at the new rate of ninety cents per gallon, which remained constant from 1875 to 1894, tax evasion *without* the cooperation of revenue collectors was still not cost-effective, and Raum's increasingly effective force of revenue agents made it harder and harder to find corrupt collectors.²¹⁸

The emergence of a nationwide temperance movement dedicated to eradicating the liquor trade provided the industry with another powerful reason for compliance with the federal regime of licensing and taxation. Although the mid-century wave of temperance had dissipated so that by 1875 only three states had retained their prohibitory laws, the 1880s brought on a tremendous resurgence in the movement. By 1890, three more states had gone fully dry, and an additional fourteen state legislatures had debated the issue.²¹⁹ In addition, the temperance movement had become far more radicalized and had shifted its tactics. Its goal now was the utter destruction of "demon rum" and the elimination of its evil effect on American society.²²⁰

In the face of this onslaught, the liquor industry turned to the federal government for support and validation. As some Civil War senators and representatives had feared,²²¹ the existence of a federal program issuing licenses to distillers and retailers and taxing them on a regular basis came to be seen as an endorsement of the industry.²²² In exchange for this implicit endorsement, the post-Whiskey Ring liquor industry willingly complied with a system of taxation that became increasingly important to the federal government. From 1870-1892, the excise on spirits provided, on average, twenty-five percent of total federal revenue every year; during the 1892-1916 period, the average rose to thirty-five percent, peaking in 1894, when the alcohol

²¹⁸See *id.* 18-20, JOHNSON, *supra* note 1, at 122-23.

²¹⁹HAMM, *supra* note 7, at 25.

²²⁰*Id.*

²²¹See *supra* note 170 and accompanying text.

²²²HAMM, *supra* note 7, at 12.

excise brought in forty-two percent of total federal revenue.²²³ Industry leaders were confident that the high amounts of taxes they paid to the federal government made their trade indispensable to Washington.²²⁴ In addition, as one industry leader pointed out, the federal tax, which remained constant from 1875-1894, was fair and predictable, while state taxes might not be. In an 1887 interview, John M. Atherton, president of the National Protective Association, a collection of distillers and wholesalers, explained:

[I]f the general Government laid no tax upon whisky the States almost certainly would. As they are under no compact to lay the same tax, the rate would almost certainly be unequal. For instance, with a tax of 25 cents a gallon on the whisky produced in Kentucky, the State would have an abundant revenue for all her needs, without taxing anything else. But it might happen that Ohio and Indiana would lay no tax, or a very light one, upon whiskey. In that case Kentucky distillers would be compelled to manufacture at a very great disadvantage, and would, in fact, be obliged to close altogether. A tax by the National Government bears on all States alike, and affords a fair field for competition.²²⁵

The temperance movement had traditionally supported the taxation of alcohol in the hopes that higher prices would result in reduced consumption, but the state of affairs in the 1880s gave them pause. The achievement of lowered consumption through higher taxes, first voiced by Hamilton and his allies in the 1790s, had proven to be elusive, for any tax theoretically high enough to turn citizens away from spirits was also high enough to encourage evasion of the tax and adulteration of alcohol to make it less expensive. On top of this failure, federal taxation had given the industry a weapon to use against temperance activists. When pressed to defend its existence on moral grounds, the liquor industry, in the words of one author “found that it could do very well by discussing the needs of the school fund, the police fund, or the road fund, instead.”²²⁶ Finally, in 1887 the Women’s Christian Temperance Union issued the following statement at its annual national convention: “We advocate the abolition of the Internal Revenue on alcoholic liquors and tobacco, for the reason that it operates to render more difficult the securing and enforcement of Prohibitory

²²³GERRITSEN, *supra* note 97, at 109.

²²⁴HAMM, *supra* note 7, at 12-13, 46.

²²⁶*Id.* at 113.

laws, and so postpones the day of national deliverance.”²²⁷

For some time, dating back to the 1847 *The License Case* ruling,²²⁸ it had appeared to the prohibitionists that the Supreme Court was working to bring that day of deliverance closer. In the 1873 case of *Bartemeyer v. State of Iowa*,²²⁹ the Court rejected an attempt to use the Privileges and Immunities Clause of the recently passed Fourteenth Amendment to invalidate an Iowa ban on the sale and manufacture of intoxicating beverages within the state. Justice Miller’s opinion for the Court first established that it had long been taken for granted that the police power included the power to regulate trade in intoxicating beverages, stating, “The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating and even prohibiting the traffic in intoxicating drinks,” so long as it did not operate “so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property.”²³⁰ Miller therefore noted that if the liquor in question had been in possession of an Iowa citizen *before* the enactment of the state law barring its sale, it would raise the “grave” question of deprivation of property without due process of law, but concluded that since pre-enactment possession had neither been established nor, for that matter, considered in the lower courts, the question was not before the Court.²³¹ As for the Privileges and Immunities Clause question, Miller rejected it out of hand. Since the right to sell intoxicating beverages was granted neither by state nor federal law, he wrote, “so far as such a right exists, [it] is not one of the rights growing out of citizenship of the United States” and thus the Privileges and Immunities Clause was irrelevant to the case.²³² Four years later, in *Boston Beer Co. v. State of Massachusetts*,²³³ the Court stated in no uncertain terms that its holding in *Bartemeyer* had comprehensively established “that as a measure of police regulation, looking to

²²⁷*Id.*

²²⁸*See supra* notes 146-148 and accompanying text.

²²⁹85 U.S. 129 (1873).

²³⁰*Id.* at 133.

²³¹*Id.* at 133-34.

²³²*Id.* at 133.

²³³97 U.S. 25 (1877)

the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States.”²³⁴ In the 1884 case of *Foster v. State of Kansas*,²³⁵ the Court went so far as to say that the question of whether a state law “prohibiting the manufacture and sale of intoxicating liquors” could ever be found unconstitutional was “no longer open in this court.”²³⁶

Despite the seemingly definitive nature of the Court’s rulings on the subject, the United States Brewers’ Association decided to reopen the question in 1881 by putting its tremendous resources behind a test case, resulting in a verdict that distressed both the alcoholic beverages industry and the temperance movement.²³⁷ That case, *Mugler v. Kansas*,²³⁸ finally reached the Supreme Court in 1887. Although the Court sustained the constitutionality of Kansas’ prohibition laws against a plethora of attacks based on the Fourteenth Amendment, marking the case a failure for the Brewers’ Association, the wording of Justice Harlan’s opinion was far from the definitive statements made by Justices Miller and Bradley in *Bartemeyer* and *Beer Co.*, respectively, and Chief Justice Waite in *Foster*. Harlan wrote:

That legislation by a state prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the fourteenth amendment.²³⁹

In three years, the Court’s position had gone from a statement that it was no longer an open question that “a state law prohibiting the manufacture and sale of intoxicating liquors was not repugnant to the constitution of the United States”²⁴⁰ to a qualified declaration that such a law “*does not necessarily* infringe any right, privilege, or immunity secured by the constitution of the United States.”²⁴¹

²³⁴*Id.* at 33.

²³⁵112 U.S. 205 (1884)

²³⁶*Id.* at 206.

²³⁷HAMM, *supra* note 7, at 49.

²³⁸123 U.S. 623 (1887).

²⁴⁰*Foster*, 112 U.S. at 206.

²⁴¹*Mugler*, 123 U.S. at 653 (emphasis added).

Even more alarming from a prohibitionist point of view, however, were the implications of Harlan's holding and Justice Field's dissent regarding the validity of *The License Cases*, which for four decades had allowed 'dry' states to prohibit the importation of intoxicating beverages from their sister states. In a bit of dicta buried at the bottom of his opinion, Harlan seemed to indicate that the question of whether the commerce clause prevented states from placing restrictions on the import and export of intoxicating liquors, decided in the negative in *The License Cases*, was an open question that the Court retained the right to review:

A portion of the argument in behalf [sic] of the defendants is to the effect that the statutes of Kansas forbid the manufacture of intoxicating liquors to be exported, or to be carried to other states, and, upon that ground, are repugnant to the clause of the constitution of the United States, giving congress power to regulate commerce with foreign nations and among the several states. We need only say, upon this point, that there is no intimation in the record that the beer which the respective defendants manufactured was intended to be carried out of the state or to foreign countries. And, without expressing an opinion as to whether such facts would have constituted a good defense, we observe that it will be time enough to decide a case of that character when it shall come before us.²⁴²

Field, in dissent, went even further. Citing Marshall's reasoning in *Brown v. Maryland* on the linkage between Congress's right to authorize import and the implied authorization of a right to sell,²⁴³ he stated, "I am not prepared to say that the state can prohibit the manufacture of such liquors within its limits if they are intended for exportation, or forbid their sale within its limits, under proper regulations for the protection of the health and morals of the people, if congress has authorized their importation."²⁴⁴ He concluded by noting, "The construction of the commercial clause of the constitution, upon which [*The License Cases*] were decided appears to me to have been substantially abandoned in later decisions."²⁴⁵

The case of *Bowman v. Chicago & Northwestern Railway Company*,²⁴⁶ decided in 1888, set in motion a series of events that would ultimately result in the overruling of *The License Cases*. *Bowman* involved an Iowa

²⁴³See *supra* notes 140-145 and accompanying text.

²⁴⁴*Mugler*, 123 U.S. at 675 (Field, J. dissenting).

²⁴⁵*Id.* (Field, J. dissenting) (citation omitted).

²⁴⁶125 U.S. 465 (1888).

law requiring common carriers to obtain a certificate from a county auditor before bringing any intoxicating beverages within the state. In his opinion for the Court, Justice Matthews noted, “It cannot be doubted that the law of Iowa now under examination, regarded as a rule for the transportation of merchandise, operates as a regulation of commerce among the states”²⁴⁷ and held that although it did not contravene any specific legislation by Congress, “it is nevertheless a breach and interruption of that liberty of trade which congress ordains as the national policy, by willing that it shall be free from restrictive regulations.”²⁴⁸ After holding the law unconstitutional, essentially on dormant Commerce Clause grounds, Matthews went on, in dicta, to suggest that the Court’s holding guaranteeing the right to import intoxicating beverages implied, as Marshall had suggested in his *Brown v. Maryland* dicta, an attendant right to sell such items, but declined to so rule.²⁴⁹

Two years later, in the case of *Leisy v. Hardin*,²⁵⁰ the Court made that dicta law. In an opinion that quoted extensively from *Brown v. Maryland*, *The License Cases*, and *Bowman*, Chief Justice Fuller held that the right to import intoxicating beverages, guaranteed in *Bowman*, “includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminates.”²⁵¹ In so holding, the Court ruled unconstitutional the Iowa prohibitory law, which, in response to *Bowman*, had been expanded to bar all sales of intoxicating beverages, whether produced in state or imported. Fuller’s opinion explicitly overturned *The License Cases*, explaining that its authority, “in so far as it rests on the view that the law of New Hampshire was valid because congress had made no regulation on the subject, must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to.”²⁵²

Accepting the *Cooley* national-local distinction established by the Taney Court in its dormant Commerce

²⁴⁷*Id.* at 479.

²⁴⁸*Id.* at 498.

²⁴⁹*Id.* at 499-500. Interestingly, Harlan dissented. His opinion in the case rejected the existence of a dormant Commerce Clause (though neither he nor Matthews used the term) and argued that in the absence of congressional action, the police power of the state was sufficient to enable Iowa to restrict rail traffic within its borders. *Id.* at 524 (Harlan, J. dissenting).

²⁵⁰135 U.S. 100 (1890).

²⁵¹*Id.* at 111.

²⁵²*Id.* at 118.

Clause jurisprudence,²⁵³ Fuller held that the interstate traffic in liquor was a national subject, and therefore, in the absence of congressional permission, no state could pass any act hindering that traffic.²⁵⁴

Leisy thus established as law the ‘original package’ doctrine first suggested by Marshall in his *Brown v. Maryland* dicta. So long as imported liquors were retailed in their original packaging, they remained in the stream of interstate commerce, and any state law barring their sale was an unconstitutional violation of the interstate commerce clause. The result was an explosion of so-called “original package houses” and “supreme court saloons” in every prohibition state.²⁵⁵ The former set of establishments retailed imported intoxicating beverages in their original packaging as if the state’s prohibitory laws did not exist. The latter allowed patrons to drink on the premises, with proprietors taking great care to ensure that it was always their customers, not they, who opened the bottles they served- thus ensuring that the drinker received his alcohol in its original packaging.²⁵⁶

VIII. CONGRESS RESPONDS: THE WILSON ACT

The outrage produced amongst temperance activists by *Leisy* and the resulting trade in original package liquor spurred Congress into action to address the situation. Three times over the course of his opinion in *Leisy*, Fuller had expressed the Court’s conviction that state legislation that regulated interstate commerce “without congressional permission” was unconstitutional, implying that such legislation *would* pass consti-

²⁵³ See *supra* notes 152-153 and accompanying text.

²⁵⁴ *Bowman*, 135 U.S. at 125.

²⁵⁵ HAMM, *supra* note 7, at 69-70.

²⁵⁶ *Id.* at 71.

tutional muster if that permission was granted.²⁵⁷ Interestingly, the push to grant that permission came not from prohibitionists, who had not yet turned to federal-level activism and lobbying, but instead from moderate Republicans, who feared that the result of *Leisy*, if left intact, would transform prohibition from an issue in a handful of states into a nationwide battle from which the Democrats would benefit.²⁵⁸ The Republicans hoped to keep the issue of prohibition confined to the state level, where it could be voted on by citizens in referendums rather than by national legislators wary of alienating voters by taking the wrong stance.²⁵⁹ As such, it was Republican Senator James Wilson of Iowa who introduced a bill explicitly mandating that any laws enacted under a state's police power would apply to imported intoxicating beverages.²⁶⁰ Wilson explained in an 1890 interview that his bill was by no means a prohibition measure, merely one granting the states "what may be called a local option, to allow them to do as they please in regard to the liquor question. They can have prohibition, high license, local option, or free liquor."²⁶¹ He indicated to his fellow senators that he believed the Supreme Court would find such a measure fully constitutional.²⁶²

Opponents of the bill attacked it almost exclusively on constitutional grounds. Senator George Vest of Missouri emphasized that the bill was a dangerous precedent that threatened to effectively nullify the interstate Commerce Clause. If Congress could pass a law exempting the states from the Commerce Clause insofar as it pertained to the alcohol trade, he warned, there was nothing preventing it from following such a law with "a successive series of such bills" exempting tobacco, oleomargarine, or any of a myriad of items.²⁶³ Senator Richard Coke of Texas argued that the bill constituted an unlawful abdication of power on the part

²⁵⁷ *Id.* at 75.

²⁵⁸ *Id.* at 79.

²⁵⁹ *Id.* at 82-83.

²⁶⁰ *Id.* at 79.

²⁶¹ HAMM, *supra* note 7, at 80 (quoting James Wilson).

²⁶² *Id.*

²⁶³ 21 CONG. REC. 4960 (1890).

of Congress, explaining, “It is a familiar principle of law . . . that delegated power can not be delegated.”²⁶⁴ Vest, Coke, and their supporters, however, were primarily using their constitutional arguments as a cloak for their true motives, which were straightforwardly anti-prohibitionist.²⁶⁵ Both Vest and Coke were staunch believers in states’ rights and a weak federal government; both had served in the Confederate military, and Vest had been a member of its Congress.²⁶⁶ Vest, in fact, had served as attorney for brewer Peter Mugler, his fees paid by the United States Brewers’ Association, in *Mugler v. Kansas*.²⁶⁷

Regardless of the true motives of the bill’s opponents in the Senate, however, the strategy of emphasizing its constitutional flaws backfired spectacularly. By explicitly removing the contentious issue of prohibition from the debate, they relieved the bill’s supporters of having to overcome an aversion on the part of a number of senators to supporting any measure seen as prohibitionist.²⁶⁸ Wilson and his allies were therefore able to rally support for the bill around the issue of states’ rights. Prominent Missouri Democrat Senator James George, for example, originally opposed the bill as a dangerous endorsement of the existence of a level of federal power over interstate commerce which he believed the Constitution did not grant- he believed that the interstate commerce clause only applied to items that were actually in transit. He switched sides on pragmatic grounds, however, lending his support to the bill in the belief that it would advance states’ rights.²⁶⁹ He explained that his advocacy of the bill sprang from his conviction that “only through such legislation can the states, under the decision of the Supreme Court, exercise their rightful and necessary jurisdiction” over trade in intoxicating beverages.²⁷⁰ The bill passed the Senate thirty-four to ten, carried by a coalition of prohibitionists, states’ rights advocates, and self-interested Republicans.²⁷¹

In the House, the bill took a more circuitous route to passage. The version of the bill reported out by the

²⁶⁴*Id.* at 5324.

²⁶⁵HAMM, *supra* note 7, at 80-81.

²⁶⁶*Id.*

²⁶⁷123 U.S. 623, 628 (1887); *See* HAMM, *supra* note 7, at 51.

²⁶⁸HAMM, *supra* note 7, at 81.

²⁶⁹*Id.*

²⁷⁰21 CONG. REC. 4955 (1890).

²⁷¹HAMM, *supra* note 7, at 82-83.

House Judiciary Committee was far broader than the one that had been approved in the Senate, mandating that “whenever *any article of commerce* is imported into any state from any other state, territory, or foreign nation, and held there or offered for sale, the same shall be subject to the laws of such state.”²⁷² In essence, the House version would have elevated the police power of the states above the interstate commerce power of the Congress in all cases, creating a tremendous shift in the federal-state balance of power.

Ironically, the bill met its fiercest opposition from states’ rights advocates who, unlike Senator George, were unwilling to advance their cause at the expense of their conception of how the American federal system worked. Texas Representative David Culberson, a Democrat, stated, “Instead of Congress being the grantee of powers from the states it assumes to become a grantor of power. The old role is reversed, the creature becomes the creator.” If the bill passed, he warned, Congress would presume itself entitled to limit and expand state power as it pleased, making states “a mendicant at the footstool of federal power.”²⁷³ Culberson was vehemently opposed to the *Leisy* ruling, which he saw as stripping states of a power over the liquor trade that was rightfully theirs and had existed since the beginning of the republic, and he viewed the Wilson Act as implicitly endorsing, rather than overturning, that ruling.²⁷⁴

The bill nonetheless passed the House by a vote of 177 to thirty-eight.²⁷⁵ Republicans formed the majority of the bill’s supporters, but they were joined by avowed prohibitionists, southern Democrats who favored Senator George’s views of the bill’s effect vis-à-vis states’ rights over those of Representative Culberson, and northern Democrats from dairying states who saw the expansive House version of the bill as a way to control the burgeoning oleomargarine industry.²⁷⁶

When the conference committee met to reconcile the two versions of the bill, the three-man House delegation quickly deferred to the Senate version of the bill. Wilson and his two Senate colleagues on the conference

²⁷²*Id.* at 83 (emphasis added).

²⁷³21 CONG. REC. 7521 (1890).

²⁷⁴HAMM, *supra* note 7, at 84.

²⁷⁵*Id.* at 294.

²⁷⁶*Id.* at 84-87.

committee were adamant that their version of what had come to be known as the Wilson Bill prevail, and the House members, feeling that that something needed to be done immediately to address the growing crisis of original package houses and supreme court saloons, allowed the application of the principles contained in the bill to other industries to be put aside for consideration another day.²⁷⁷

While the Senate version of the bill lost some supporters in the House, especially those northern Democrats who had voted in anticipation of applying the bill to state bans on oleomargarine, it nonetheless passed by a vote of 119 to ninety-three²⁷⁸ and was signed into law on August 8, 1890- less than four months after the Supreme Court had issued its decision in *Leisy*.²⁷⁹ The Wilson Act, as passed, consisted of a mere one paragraph, declaring only that any intoxicating liquors imported into a state or territory would, upon arrival:

... be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by any reason of being introduced therein in original packages or otherwise.²⁸⁰

The Wilson Act was a powerful victory for prohibitionists. It rendered the “original package house” industry illegal and served as a valuable precedent: for the first time, Congress had legislated on the subject of prohibition.²⁸¹ Wilson and his Republican allies, though at best disinterested in the cause of prohibition, had opened the floodgates of federal regulation, setting the prohibition movement on a path that would ultimately lead to the Eighteenth Amendment.²⁸²

²⁷⁷ *Id.* at 85.

²⁷⁸ *Id.* at 294.

²⁷⁹ *Id.* at 85-86.

²⁸¹ HAMM, *supra* note 7, at 91.

²⁸² *Id.* at 57.

IX. RECTIFICATION, FORTIFICATION, AND “THE DISCOVERIES OF SCIENCE”: ADULTERATION OF
INTOXICATING BEVERAGES

For the time being, however, Congress faced another problem requiring its legislative attention: the adulteration of intoxicating beverages. Over the course of twenty-seven years, beginning with the first failed bill attempting to regulate domestically produced food and drugs in 1879 and culminating in the June 6, 1906 enactment of the Federal Food and Drugs Act (the “Food and Drugs Act”),²⁸³ Congress and the nation as a whole engaged in an epic legislative battle over the federal role in regulating adulterated foods. Throughout this period, distillers, brewers, vintners, and retailers of liquor played a key role in the national debate on adulteration.

Congress took action to ensure the purity of imported intoxicating beverages well before it turned to domestically produced items. As early as 1862, Congress had considered supplementing its 1848 act requiring purity inspections for imported drugs²⁸⁴ with legislation doing the same for “all spirituous, vinous, malt, brewed, or fermented liquors, cordials, or any admixtures thereof, introduced or imported into any port... from abroad.”²⁸⁵ That bill was never brought to a vote, however, and it was not until 1890 that Congress made it unlawful “to import into the United States any adulterated... vinous, spirituous, or malt liquors, adulterated or mixed with any poisonous or noxious chemical drug or other ingredient injurious to health”²⁸⁶ as part of a bill regulating the importation of food and drugs as a whole.

Well before the passage of the Food and Drugs Act, the federal government found itself in the business of guaranteeing the purity of whisky. During the Civil War, as detailed earlier, adulteration of intoxicating

²⁸³Ch 3915, 34 Stat 768 (1906).

²⁸⁴Act of June 26, 1848, ch. 71, 9 Stat. 237 (1848).

²⁸⁵S. 287, 37th Cong (2d Sess. 1862).

²⁸⁶Act of August 30, 1890, ch. 839, 26 Stat. 414, 415 (1890).

beverages undertaken in order to avoid the heavy taxes placed on legitimately manufactured items had been widespread.²⁸⁷ Despite the lowering of taxes after the war's end, the practice continued, much to the dismay of legitimate wholesalers and manufacturers. In the same 1887 interview in which he praised the federal excise tax on distilled spirits for guaranteeing a stable, nationwide level of taxing,²⁸⁸ John M. Atherton, President of the National Protective Association (protecting, specifically, distillers and liquor wholesalers) noted the prevalence of adulteration and the importance of an outside standard of verification. He stated:

Under the Government supervision there are certain marks, stamps, gauges, etc., put on every barrel of whisky, which serve to identify it. They form an absolute guaranty from the Government, a disinterested party of the highest authority, to the genuineness of the goods. There is such a tendency to adulteration that this guarantee is of great value.²⁸⁹

These stamps were part of the federal system of taxing distillers, which, as established by the 1868 legislation, provided for an extended “bonding” period during which whisky was placed in a warehouse and allowed to age. Over the course of this period, which was initially set at one year and subsequently lengthened several times until by 1894 it lasted for eight years,²⁹⁰ the whisky was under the complete control of the federal government. Revenue collectors were authorized to enter any time, night or day, while the actual owners of the warehouses and the products within were only allowed access in the company of the collectors.²⁹¹ This process, while designed to ensure that distillers would be unable to avoid paying taxes on their product as they had during the Civil War,²⁹² also served to guarantee the integrity of the product. When newly distilled whisky was placed in an oak barrel for aging, a revenue collector placed a stamp on it with a variety of information relevant for the collection of revenue, for example, the date it was produced and the name of the distiller. At the end of the bonding period,

²⁸⁷ See *supra* note 185 and accompanying text.

²⁸⁸ See *supra* note 225 and accompanying text.

²⁹⁰ *Id.* at 119-21.

²⁹¹ See *supra* notes 208-209 and accompanying text; JOHNSON, *supra* note 1, at 118.

²⁹² See *supra* notes 193-200 and accompanying text.

the distiller paid the tax and an additional stamp was placed on the barrel noting the date of withdrawal from bond. When a consumer or retailer received an unopened, double-stamped barrel, therefore, he could rest assured that its contents were genuine, government-certified whisky.²⁹³

The problem, however, was that the double-stamp certification only provided a guarantee to the buyer of barrels. The vast majority of consumers, who preferred their whisky in more manageable quantities such as in a glass at the bar or a small bottle to take home, often had no way of knowing whether or not their whisky came from a double-stamped barrel.²⁹⁴ In 1897, therefore, Congress passed the Bottled in Bond Act, which allowed distillers, hitherto required to sell only in barrels, to bottle their whisky in small, retail-sized containers that would then be given a certifying stamp by the revenue collector.²⁹⁵

The federal government's expanding role in certifying the purity of whisky was made necessary by the growing prevalence of adulterated products and cheap imitations. The invention of the "continuous still" had made the production of pure, neutral spirits tremendously simple and inexpensive. Such spirits were produced in a different, much less expensive manner than those distilled through the traditional methods.²⁹⁶ The easy availability and low price of neutral spirits led to the rise of the practice of "rectification," in which neutral spirits were colored and flavored in order to imitate whisky and then passed off to credulous consumers as the genuine article. As the legendary Dr. Harvey W. Wiley, Chief Chemist of the Department

²⁹³HARVEY W. WILEY, *THE HISTORY OF A CRIME AGAINST THE FOOD LAW* 99 (1929) [hereinafter WILEY, *HISTORY OF A CRIME*].

²⁹⁴*Id.* at 99-100.

²⁹⁵Bottled in Bond Act, ch. 379, 29 Stat 626 (1897). The Bottled in Bond Act was in part an attempt on Congress' part to mollify distillers from an 1894 tax hike that had upset the industry. In that year, the tax on distilled spirits was raised for the first time since 1875, from ninety cents to \$1.10. Act of August 27, 1894, ch. 349, 28 Stat. 509, 563 (1894). What made this especially upsetting from the distillers' point of view was that for the first time, the higher tax level applied to stock on hand, rather than to future production only. Distillers therefore not only had to sell their product at a higher price, risking a drop in demand, but missed out on the hoarding profit they had come to expect from tax hikes. HU, *supra* note 24, at 46.

²⁹⁶WILEY, *HISTORY OF A CRIME*, *supra* note 293, at 99.

of Agriculture's Bureau of Chemistry during this period, explained in characteristically colorful language, "The term 'rectify' etymologically means to 'straighten.' But the whisky rectifier was doing nothing more or less than making crooked whisky of the crookedest kind that enlivened the throats and gullets of the thirsty men in that pre-Volstead era."²⁹⁷

Government investigations soon revealed just how prevalent this "crookedness" was. In 1898, the Senate adopted a resolution authorizing its Committee on Manufacturers to investigate the existence and extent of the adulteration of food and drugs to determine "which, if any of said products are deleterious to public health, and which, if any, of said products are frauds on upon the purchasers."²⁹⁸ The Committee soon found itself focusing chiefly on whisky, and in doing so, it determined that the majority of whisky sold in the United States was either adulterated or utterly fake.²⁹⁹ Wiley's Bureau of Chemistry took a large part in this investigation of the issue popularly referred to as "What is Whisky?" and determined that there existed a "radical difference" between genuine, aged whisky and the imitation product.³⁰⁰ The 'rectified' product, the Committee found with the aid of the Bureau, was generally made of neutral spirits combined with burnt sugar, organic acids, artificial colors and flavors, and oils to create the proper texture, and was sold either on its own or mixed with genuine whisky.³⁰¹ Wiley later estimated that by the end of the period leading up to the enactment of the Food and Drugs Act, the rectifiers, "men and business firms of formidable power and strength," controlled from eighty-five to ninety percent of the domestic market for distilled spirits, placing them in effective control of the entire distilling industry.³⁰²

Adulteration of wine was equally prevalent during this period. As previously noted,³⁰³ Americans liked their wine artificially strong, which required the addition of alcohol to the naturally produced product. Practically

²⁹⁷HARVEY W. WILEY, AN AUTOBIOGRAPHY 204-05 (1930) [hereinafter WILEY, AUTOBIOGRAPHY].

²⁹⁸S. RES. 447, 55th Cong. (1898); see Peter Barton Hutt, *Investigations and Reports on the Food and Drug Administration*, in FOOD AND DRUG LAW 44 (Richard M. Cooper ed., 1991).

²⁹⁹JOHNSON, *supra* note 1, at 133.

³⁰⁰WILEY, HISTORY OF A CRIME, *supra* note 293, at 100.

³⁰¹JOHNSON, *supra* note 1, at 133; WILEY, AUTOBIOGRAPHY, *supra* note 297 at 204-05.

³⁰²WILEY, AUTOBIOGRAPHY, *supra* note 297, at 205.

³⁰³See *supra* notes 134-136 and accompanying text.

every variety of wine consumed by Americans was therefore fortified by pure spirits, which were also used to create ‘imitation’ wines from scratch.³⁰⁴ Wine fortifiers, however, found their profit margins lowered when Congress imposed the high excise taxes of the Civil War on pure spirits as well as potable whisky. Fortifiers soon found that paying \$2.50 to \$2.90 a gallon for spirits to fortify wine that consumers expected to purchase on the cheap was less than cost-effective. As demonstrated by the Whiskey Ring scandal, many revenue collectors of the 1860s and 1870s were not quite paragons of virtue, and fortifiers found that the bribes they paid to revenueurs inducing them to look the other way added up to much less than the cost of paying the tax on spirits. The increasing professionalization of the revenue force after 1875, however, made it far more difficult to avoid the expenses involved in fortifying wine with legitimately taxed spirits, and American wine sellers found themselves being undercut by foreign suppliers who could fortify their wine at a much cheaper cost.³⁰⁵

California’s burgeoning wine industry was able to leverage this foreign threat into an 1890 act by Congress that tremendously altered the economics of wine fortification. The Act passed October 1 of that year allowed “wine spirits,” that is, grape brandy, to be produced tax-free for the purpose of fortifying sweet wines.³⁰⁶ The fortification was required to be done under the supervision of revenue officers and according to regulations issued by the Revenue Department and could not result in the addition of more than fourteen percent of brandy by volume in the wine or a total alcohol content of more than twenty-four percent.³⁰⁷ The act thus saved winemakers over fifty cents of tax per gallon, which allowed them to offer their product to the public at a lower cost.³⁰⁸ The result was an explosion in production from 1,083,274 gallons in 1890 to a high of 24,198,767 gallons in 1912.³⁰⁹

³⁰⁴SPECIAL COMMISSION REPORT, *supra* note 184, at 164-65; JOHNSON, *supra* note 1, at 122.

³⁰⁵JOHNSON, *supra* note 1, at 122-23.

³⁰⁶Act of October 1, 1890, ch. 1244, 26 Stat. 567, 621-24 (1890).

³⁰⁷*Id.* at 621-22.

³⁰⁸JOHNSON, *supra* note 1, at 123.

³⁰⁹*Id.* at 124.

The act was a tremendous boon to the industry, but the very success it engendered resulted in an uncomfortable level of scrutiny for the fortifiers. The phenomenal growth enjoyed by the wine industry caused Internal Revenue Commissioner John W. Yerkes to note in his annual reports in 1904 and 1905 that not only did the absences of a tax on “wine spirits” deprive the government of a possible source of revenue, the system actually *cost* the government \$25,000-\$30,000 a year for the supervision of fortification.³¹⁰ His calls for a tax on grape brandy were bolstered by complaints from manufacturers who used denatured alcohol for industrial purposes and complained of the unfairness of taxing their productive use of alcohol while essentially subsidizing wine fortifiers.³¹¹

Noting with alarm the bad publicity these two streams of criticism had generated, representatives of the wine fortification industry lobbied Congress to re-impose a tax on the spirits they used, which it passed in 1906.³¹² The resulting three-cent per gallon tax was twenty-two cents less than Commissioner Yerkes had suggested, but it did generate three to four times the revenue required to cover the government’s costs in supervising the industry.³¹³ As a reward to the fortifiers for ‘acquiescing’ in this tax, Congress added language to the legislation imposing the excise explicitly allowing the use of sugar and water in wine up to a level of ten percent by volume.³¹⁴ Coupled with the fourteen percent by volume limit for grape brandy already in place, this meant that by 1906, the same year that Congress passed the Food and Drugs Act, American wine makers were legally allowed to sell wine that was twenty-four percent adulterated.³¹⁵ In the first decade of the twentieth century, therefore, adulteration in the alcoholic beverages industry was prevalent and the industry steadfastly opposed to any laws that would prevent the continuation of that state of affairs.

³¹⁰*Id.*

³¹¹*Id.* at 125.

³¹²Act of June 7, 1906, ch. 3046, 34 Stat. 215 (1906).

³¹³JOHNSON, *supra* note 1, at 125.

³¹⁴34 Stat. at 215.

³¹⁵A bill enacted the same day as the three-cent wine duty settled the controversy over denatured alcohol in favor of the manufacturers, allowing them to obtain alcohol tax-free “for use in the arts and industries, and for fuel, light, and power” provided that the alcohol was, in the presence of a government officer, subjected to a process of denaturization “which destroys its character as a beverage, and renders it unfit for liquid medicinal purposes.” Act of June 7, 1906, ch 3047, 34 Stat. 217 (1906).

Wiley considered the “rectifiers,” who controlled the distilling industry as a whole,³¹⁶ to be among the worst foes of the federal food purity law.³¹⁷ Indeed, in a 1946 New York State Bar Association conference held to commemorate the fortieth anniversary of the bill’s enactment, Charles Wesley Dunn, Chairman of the New York Bar’s Section on Food, Drug, and Cosmetic Law and the guiding spirit behind the Food and Drug Law Institute, cited “the bitter controversies over what is whisky” as one of the key impediments to the passage of the bill.³¹⁸ The position of the wine industry on the issue is perhaps best illustrated by the fact that the wine fortifiers obtained passage of the bill allowing twenty-four percent adulteration of wine³¹⁹ only weeks before the enactment of the Food and Drugs Act. As for the brewing industry, it had been successfully fighting off legislation barring the adulteration of beer since 1890 under the pretense of wishing to remain able to “avail itself of the discoveries of science.”³²⁰

X. WILEY ON WHISKY

Notwithstanding the fervent opposition offered by, among many others, the alcoholic beverage industry, the almost three-decade long quest for a federal law regulating the purity and labeling of food and drugs ended in success with the 1906 enactment of the Food and Drugs Act, which was well understood to apply to intoxicating beverages. The act defined food as “all articles used for food, drink, confectionary, or condiment by man or other animals;”³²¹ more explicitly, it was subtitled “An Act for preventing the manufacture, sale, or

³¹⁶ See *supra* note 297 and accompanying text.

³¹⁷ WILEY, AUTOBIOGRAPHY, *supra* note 297, at 203-04.

³¹⁸ Charles Wesley Dunn, *Its Legislative History*, in HISTORIC MEETING TO COMMEMORATE FORTIETH ANNIVERSARY OF ORIGINAL FEDERAL FOOD AND DRUG ACT 19 (Charles Wesley Dunn ed., 1946).

³¹⁹ See *supra* note 314 and accompanying text.

³²⁰ JOHNSON, *supra* note 1, at 133.

³²¹ Federal Food and Drugs Act of 1906, ch. 3915, 34 Stat. 768, 769 (1906).

transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes”³²² and it authorized the seizure of “any article of food, drug, or liquor” found to be in violation of its provisions.³²³ It was therefore clear that all of the act’s provisions on adulteration and misbranding were intended to apply to intoxicating beverages.

The enactment of the “Pure Food Law” was a tremendous victory for Dr. Wiley, who believed that the bill would give him the power to end once and for all the adulteration and misbranding of food- including the sale of the so-called “rectified” whisky, a special irritant to him. From the time that he first started his study of the whisky question, he wrote in his autobiography, “I was determined to beat the rectifiers.”³²⁴ Wiley’s passion on the point is illustrated by the devotion of an entire chapter of his fiery work The History of a Crime Against the Food Law (“History of a Crime”) to the subject, entitling the chapter “What is Whisky?”³²⁵

Even as Wiley prepared to move against imitation and adulterated whisky, the rectifiers, who had struggled mightily to prevent passage of the Food and Drugs Act,³²⁶ immediately sought assurances that the new law would not prevent them from referring to their product as “whisky,” which Wiley flatly denied. Food Inspection Decision #45 (“F.I.D. #45”),³²⁷ prepared by the Bureau of Chemistry and signed by Secretary of Agriculture James Wilson, was issued on December 1, 1906 as a response to a series of letters from the rectifiers requesting clarification on the subject.³²⁸ F.I.D. #45 was a definitive rejection of the rectifiers’ requests and a staunch defense of pure whisky. It stated:

³²²*Id.* at 768.

³²³*Id.* at 771.

³²⁴WILEY, AUTOBIOGRAPHY, *supra* note 297, at 257.

³²⁵*See generally* WILEY, HISTORY OF A CRIME, *supra* note 293, at 98-153.

³²⁶*Id.* at 100.

³²⁷Food Inspection Decision #45 (December 1, 1906), *in* FOOD AND DRUGS ACT, JUNE 30, 1906: RULES AND REGULATIONS FOR THE ENFORCEMENT OF THE ACT, FOOD INSPECTION DECISIONS, SELECTED COURT DECISIONS, OPINIONS OF THE ATTORNEY GENERAL AND APPENDIX 36 (C.A. Gwinn ed., 1913) [hereinafter F.I.D. #45].

³²⁸WILEY, HISTORY OF A CRIME, *supra* note 293, at 107.

The question presented [in the rectifiers' letters] is whether neutral spirits may be added to Bourbon whisky in varying quantities, colored and flavored and the resulting mixture be labeled blended "*whiskies*." To permit the use of the word "whiskies" in the described mixture is to admit that flavor and color can be added to neutral spirits and the resulting mixture be labeled "whisky." The Department is of the opinion that the mixtures presented cannot legally be labeled either "blended whiskies" or "blended whisky."...If neutral spirit, also known as cologne spirit, silent spirit, or alcohol, be diluted with water to a proper proof for consumption and artificially colored and flavored, it does not become a whisky, but a "spurious imitation" thereof. . . The mixture of such an imitation with a genuine article cannot be regarded as a mixture of like substances within the letter and intent of the law.³²⁹

Secretary Wilson soon made it clear to Wiley that despite having signed F.I.D. #45, he did not agree with its contents. Less than three months after the promulgation of the decision, Wiley writes in History of a Crime, he was called into Wilson's office to hear George P. McCabe, Solicitor for the Department of Agriculture, inform the Secretary that "Dr. Wiley's definition of whisky is absurd. Whisky is any alcoholic beverage made from grain, properly colored and flavored, according to the prevailing custom of the trade."³³⁰ Wilson promptly agreed with McCabe. Wiley protested that only the Bureau of Chemistry had the authority to make the initial decision as to what constituted mislabeling or adulteration, to which, Wiley writes, Wilson replied, "I will not take your construction of the law, but that of my Solicitor; that is what he is here for, to interpret the law to me."³³¹

Wiley's response to being overruled by the Secretary was immediate and bold, displaying what one historian of the time described as his "spiritual zeal of a crusader. . . [and] keen instinct for the dramatic."³³² Outraged by Wilson's decision, Wiley called William Loeb, President Theodore Roosevelt's private secretary, and asked for an opportunity to present his case to the president before any further action was taken. Over the course of the next two weeks, Wiley explains, he waited "patiently" while the president received representatives of

³³⁰WILEY, *HISTORY OF A CRIME*, *supra* note 293, at 109.

³³¹*Id.* at 109.

³³²MARK SULLIVAN, 2 *OUR TIMES: THE UNITED STATES 1900-1925* 519 (1927).

the rectifiers, usually accompanied by senators representing the states in which the industry was located.³³³

When he finally received word that the president would see him, he writes, he was ready: “I had prepared a moveable laboratory with all the elements necessary to manufacture ten year old Bourbon or Scotch in a minute.”³³⁴ After pausing outside the White House to inform reporters, “I am going to give a lecture to the president of the United States,”³³⁵ he entered the building and set up his experiments. As Wiley recalls the ensuing meeting, he spoke virtually uninterrupted for two hours, after which the president arose to grasp his hand and intoned, “Dr. Wiley, I have heard nothing but whisky for the last three weeks, and you are the first person who has ever given me a single idea that I can comprehend.”³³⁶

Regardless of whether the president was quite as effusive as Wiley later recalled,³³⁷ the doctor had clearly carried the day. On April 11, 1907, the president himself sent a letter directly to Secretary Wilson, stating:

Straight whisky will be labeled as such. A mixture of two or more straight whiskies will be labeled “Blended whisky” or “whiskies.” A mixture of straight whisky and ethyl alcohol, provided that there is a sufficient amount of straight whisky to make it genuinely a “mixture” will be labeled as compound of, or compounded with, pure grain distillate. Imitation whisky will be labeled as such.³³⁸

Roosevelt based his brief letter on a much longer one by Attorney General Charles J. Bonaparte, to whom he had referred the matter after his meeting with Wiley. In his comprehensive letter, Bonaparte had emphatically endorsed Wiley’s view, which he would continue to do over the course of the whisky controversy.³³⁹

³³³WILEY, HISTORY OF A CRIME, *supra* note 293, at 109-110.

³³⁴*Id.* at 110-11.

³³⁵WILEY, AUTOBIOGRAPHY, *supra* note 297, at 258.

³³⁶WILEY, HISTORY OF A CRIME, *supra* note 293, at 111.

³³⁷Wiley had mixed experiences with Roosevelt over the course of the latter’s tenure in office, as he admits in his autobiography: “I fear this man [Roosevelt] with who I had many good contacts after he became president never had a very good opinion of me, for I ran afoul of his good will in the first months of his administration.” WILEY, AUTOBIOGRAPHY, *supra* note 297, 221. For Wiley’s amusing overview of the relationship between these two larger-than-life figures, *see generally* WILEY, HISTORY OF A CRIME, *supra* note 293, at 263-74.

³³⁹Bonaparte’s long letter addressing the subject ended with a series of tongue-in-cheek suggestions for labeling various whiskies, imitations, and combinations thereof:

- (1) Semper Idem Whisky: A pure, straight whisky mellowed by age.
- (2) E Pluribus Unum Whisky: A compound of pure, straight whiskies with all the merits of each.
- (3) Modern Improved Whisky: A compound of pure grain distillates, mellow and free from harmful impurities.
- (4) Something Better Than Whisky: An imitation under the pure food law, free from fusel oil and other impurities.

Id. at 60.

The two letters were combined and promulgated as Food Inspection Decision #65 (“F.I.D. #65”) “governing the labeling of whisky, blends, compounds, and imitations thereof.”³⁴⁰

Over the next several years, the Board of Food and Drug Inspection, a committee within the Department of Agriculture charged with enforcement of the 1906 law, brought a number of cases *in rem* against whisky misbranded under the terms of F.I.D. #65, though not as many as Wiley would have preferred. In all seven of the cases considered by the courts, the seizures involved were upheld.³⁴¹ The ever-zealous Wiley noted in History of a Crime his frustration at the fact that the enforcement power for the law rested with the Board rather than with his Bureau of Chemistry³⁴² as well as his disappointment that no criminal charges were ever brought against the sellers of mislabeled whisky.³⁴³

Despite the seemingly definitive nature of F.I.D. #65 and the success of court proceedings under it, the “What is Whisky” controversy continued throughout the Roosevelt administration. Under pressure from the rectifying industry as well as members of his own cabinet who disagreed with F.I.D. #65, Roosevelt appointed a commission to study the question in late 1907.³⁴⁴ The commission’s report, delivered to the president on February 19, 1909 as his time in office was coming to an end, was in favor of allowing the liberal use of the word ‘whisky’ in labeling products made of neutral spirits but recommended the addition of some sort of qualifier, such as ‘neutral whisky’ or ‘redistilled whisky’ to indicate the nature of the product.³⁴⁵ The commission, however, had toiled in vain. Attorney General Bonaparte responded to the commission’s report with a heated letter to the president noting with some sarcasm that the commission, comprised entirely of individuals with no legal experience whatsoever, had based its recommendations not on the Food and Drugs Act but rather on a study of a British Royal Commission on whisky that was utterly irrelevant to

³⁴⁰*Id.* at 51.

³⁴¹WILEY, HISTORY OF A CRIME, *supra* note 293, at 119-22; *see, e.g.*, United States v. 50 Barrels of Whisky, 165 F. 966 (1908) (Overruling exception to libel in jury verdict in favor of United States for seizure and forfeiture of fifty barrels of distilled spirits misbranded contrary to provisions of Food and Drugs Act).

³⁴²WILEY, HISTORY OF A CRIME, *supra* note 293, at 158-60.

³⁴³*Id.* at 122-23.

³⁴⁴*Id.* at 128, 133.

³⁴⁵*Id.* at 128-29, 135.

the construction of the American law. Bonaparte vehemently stood by his 1907 letter on which F.I.D. #65 was based, and the president accepted his recommendation, setting aside the work of the commission and leaving the standing regulation in place.³⁴⁶

Under Roosevelt's successor William H. Taft, however, the question was reopened once again, and, as Wiley was forced to concede, "[the] rectifiers gained every point."³⁴⁷ Taft, who had been sympathetic to the rectifiers' desire to sell their product under the name "whisky" while serving as Roosevelt's Secretary of War, ordered his Solicitor General Lloyd Bowers to hold a series of hearings on the issue.³⁴⁸ The result was 1,328 pages of testimony and an opinion by Bowers that satisfied no one.³⁴⁹ Bowers' report recommended denial of the term "whisky" to describe beverages made wholly from neutral spirits, which enraged rectifiers, but would have allowed for combinations of pure distilled whisky and neutral spirits to be sold as whisky, which was utterly unacceptable to pure food advocates.³⁵⁰ On December 27, 1909, Taft, having been bombarded with complaints from all sides, issued a letter stating his position on the matter: pure, distilled whisky was to be labeled as "straight whisky," while beverages made to taste like whisky could use that word to describe their product, so long as they included a modifier explaining the beverage's origins, such as "whisky made from rectified spirits," "whisky made from redistilled spirits," or "whisky made from neutral spirits."³⁵¹

In response to Taft's letter, the Secretaries of the Treasury, Agriculture, and Commerce and Labor, exercising their authority under the Food and Drugs Act,³⁵² issued Food Inspection Decision #113 ("F.I.D.

³⁴⁶*Id.* at 129-31, 135-36. Wiley reported an "unconfirmed rumor" of the time that Bonaparte had threatened to resign if Roosevelt reversed his decision in F.I.D. #65. *Id.* at 135.

³⁴⁷*Id.* at 150.

³⁴⁸*Id.* at 137, 139.

³⁴⁹*Id.* at 141, 143. Wiley wrote, "Perhaps no public decision ever issued received such unanimous condemnation as Bowers' report." *Id.* at 143.

³⁵⁰*Id.* at 143-44.

³⁵¹*Id.* at 145. Taft's opinion was an utter rejection of Bowers' report in favor of the previously discarded opinions of the commission appointed by Roosevelt two years earlier. *See supra* note 345 and accompanying text. Wiley reports that the next morning, he told Bowers, "I feel as if I had been spanked," to which Bowers replied, "So do I." The following morning- two days after the President had issued his letter- Bowers left the capital for "a few weeks' rest." He died three weeks later. Noting the widespread and furious criticism to which Bowers' report had been subjected and the president's outright rejection of his Solicitor General's recommendations, Wiley wrote, "I think I was right in thinking that probably his premature death was due to a broken heart." WILEY, HISTORY OF A CRIME, *supra* note 293, at 151.

³⁵²*See* Federal Food and Drugs Act of 1906, ch. 3915, 34 Stat. 768, 768-69 (1906).

#113”), which marked a complete defeat for Dr. Wiley. Wiley notes with bitterness in History of a Crime that F.I.D. #113 went against Taft’s letter and in favor of the rectifiers in several respects.³⁵³ The new regulation mandated that “all unmixed distilled spirits from grain, colored and flavored with harmless color and flavor, in the customary ways. . . if of potable strength and not less than 80° proof, are entitled to the name whisky without qualification.”³⁵⁴ By holding that straight whisky, rectified whisky, redistilled whisky, and neutral spirits were “like substances” and allowing them all to be labeled simply as “whisky,” F.I.D. #113 completely ignored Taft’s mandate that ‘whiskies’ made from rectified, redistilled, or neutral spirits be labeled as such.³⁵⁵ The rule merely required mixtures of any sort- one pure whisky with another, pure whisky with neutral spirits, or neutral spirits with other neutral spirits- to be labeled as “blends” of whisky without any further explanation.³⁵⁶ It denied the use of the term “whisky” for distillates from items such as fruits or vegetables and required whiskies of one kind simulating another kind to carry a modifier on the label, for example, if rye essence was added to “highly rectified distillate of corn,” the product would be labeled, “whisky- imitation rye.”³⁵⁷ These very minor requirements notwithstanding, Wiley writes, F.I.D. #113 marked a complete victory for the rectifiers and a dark day for the opponents of misbranding and adulteration of alcohol in particular and food in general. The new rule, which explicitly overturned F.I.D. #45 and F.I.D. #65 as well as their progeny,³⁵⁸ was, in his words, “the first cause of paralyzing the food law.”³⁵⁹ By signaling that any beverage distilled from grain could be labeled “whisky,” it allowed rectifiers to sell cheaply distilled neutral spirits colored and flavored as whisky under the same name as the genuine article- exactly what the rectifiers had wished for and Wiley had fought against all along.³⁶⁰ F.I.D. #113

³⁵³WILEY, HISTORY OF A CRIME, *supra* note 293, at 147-50.

³⁵⁴Food Inspection Decision #113 (February 16, 1910), in FOOD AND DRUGS ACT, JUNE 30, 1906: RULES AND REGULATIONS FOR THE ENFORCEMENT OF THE ACT, FOOD INSPECTION DECISIONS, SELECTED COURT DECISIONS, OPINIONS OF THE ATTORNEY GENERAL AND APPENDIX 129 (C.A. Gwinn ed., 1913).

³⁵⁵*Id.*

³⁵⁶*Id.*

³⁵⁷*Id.*

³⁵⁸*Id.*

³⁵⁹WILEY, HISTORY OF A CRIME, *supra* note 293, at 98.

³⁶⁰*Id.* at 150. A 1912 editorial cartoon from the Rocky Mountain News issued on the occasion of Wiley’s retirement from the

remained in place until the onset of Prohibition, when, as Wiley wryly notes in History of a Crime, the question switched from “What is Whisky?” to “Where is Whisky?”³⁶¹

XI. CONGRESS RESPONDS... AGAIN: FROM WILSON TO WEBB-KENYON

Just as the Food and Drugs Act did not end the controversy over whisky, the 1890 passage of the Wilson Act failed to definitely return the thorny problem of prohibition policy to the states. The very day after President Benjamin Harrison signed the law, liquor wholesaler Charles A. Rahrer was arrested for selling a pint of ‘original package’ whisky in a dry state as had been established as legal in *Leisy* but superceded by the Wilson Act.³⁶² Funded by a group of Chicago brewers and liquor dealers, he appealed for a writ of habeas corpus in federal court, beginning a test case with the aim of having the Wilson Act ruled unconstitutional.³⁶³ The ensuing case, *In re Rahrer*,³⁶⁴ reached the Supreme Court in 1891.

In his opinion for the court in *Rahrer*, Chief Justice Fuller upheld both the constitutionality of the Wilson Act and the arrest of Rahrer under Kansas’ prohibition law. Fuller held that the Wilson Act was not a delegation of the power to regulate interstate commerce from Congress to the states but instead a straightforward enactment of “its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property.”³⁶⁵ He held that the

Bureau of Chemistry and reprinted in *History of a Crime* shows Uncle Sam embracing the departing doctor and exclaiming, “I love you for the enemies you have made!!” Behind the two figures, cartoon recreations of those enemies dance in glee over Wiley’s exit. Clearly visible among that group, flanked by “Impure Food” and “Patent Medicine,” is a bottle labeled “Fake Whisky.” *Id.* at 97.

³⁶¹*Id.* at 152.

³⁶²HAMM, *supra* note 7, at 88.

³⁶³*Id.* at 88-89.

³⁶⁴140 U.S. 545 (1891).

³⁶⁵*Id.* at 561.

Wilson Act merely defined the moment at which an item ceased to be involved in interstate commerce:

The power to regulate [interstate commerce] is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or state. No reason is perceived why, if congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.³⁶⁶

The implication of the ruling was that *Leisy*, the continued validity of which was unquestioned by the Court, had featured both a constitutional holding and a logistical assumption. The former aspect of the case was still valid: state laws did not apply to items within the stream of interstate commerce. In so ruling, however, the Court had established a provisional default definition of what constituted interstate commerce, holding that an item was a part of interstate commerce until it reached its final recipient. The holding in *Rahrer* was essentially that Congress, due to its constitutional power to regulate interstate commerce, had the right to overturn this assumption:

Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.³⁶⁷

The Wilson Act, Fuller thus held, merely established that an intoxicating beverage sent from one state to another lost its character as a part of the stream of interstate commerce *before* it reached its final recipient, thus overruling the Court's assumption in *Leisy* that an item sent to a retailer was still a subject of interstate commerce until its final sale. The Court's ruling established that once "fermented, distilled, or other intoxicating liquors or liquids [were] transported into the state of Kansas," they "became subject to the operation and effect of the existing laws of that state in reference to such articles," including an absolute ban on sale.³⁶⁸

By upholding the constitutionality of the Wilson Act, *In re Rahrer* gave the temperance movement an immediate victory over the "original package houses" and "supreme court saloons" that had been the legacy of *Leisy*.³⁶⁹ No longer could retailers operate with impunity simply because their wares had been imported from other states- a state's ban on the sale of intoxicating beverages now extended to imported liquor, which Congress had declared to leave the stream of interstate commerce upon arrival in the state.

The question of what “on arrival” meant, left open by the *Rahrer* opinion, was answered seven years later in a case that decisively weakened the ability of dry states to use the Wilson Act to keep intoxicating beverages from entering their borders. The 1898 case of *Rhodes v. State of Iowa*³⁷⁰ involved the Iowa statute, ruled unconstitutional in *Bowman*, requiring railroads and other common carriers to obtain a certificate from a county auditor before bringing any intoxicating liquors into the state. Following the passage of the Wilson Act, the Iowa legislature had re-enacted the forbidden law. Accordingly, in August of 1891, when John Rhodes, an Iowa station agent for the Burlington & Western Company, moved a box containing intoxicating liquors owned by the company from a railcar into a freight warehouse, the state arrested him and seized the liquor. Justice White, writing for the Court, noted that the “pivotal question” in the case was whether the Wilson Act “operate[d] to attach the legislation of the state of Iowa to the goods in question the moment they reached the state line.”³⁷¹ He acknowledged that the statutory language stating that intoxicating beverages “shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory” could be held to mean arrival at the state line, but held that to interpret the law in such a manner “would necessitate isolating these words from the entire context of the act, and would compel a construction destructive of other provisions contained therein.”³⁷² Furthermore, he explained, interpreting the law as such would give Iowa the power to prevent the passage of any intoxicating beverages through its territory en route from one state to a third state, an obviously unconstitutional state regulation of interstate commerce.³⁷³ Taking into consideration the language of the Wilson Act as well as the plain fact that it had been enacted as a direct response to *Bowman* and *Leisy*, White ruled:

[I]t is reasonable to infer that the provisions of the act were intended by congress to cause the legislative authority of the respective states to attach to intoxicating liquors coming into the states by an interstate shipment, only after the consummation of the shipment, but before the sale of the merchandise; that is, that the one receiving merchandise of the character named should, while retaining the full right to use the same, no longer enjoy the right to sell free from the restrictions as to sale created by state legislation—a right which the decision in *Leisy v. Hardin* had just previously declared to exist.³⁷⁴

Rhodes and its companion case of *Vance v. W.A. Vandercook Co.*³⁷⁵ therefore defined the Wilson Act in a manner far narrower than the prohibitionists had wished. Rather than allowing states to ban the importation of intoxicating beverages, it merely allowed the banning of their resale. State legislation could take away the right to sell imported liquors, but it could not deny the initial recipient the right to use— that is, to drink— the beverages he lawfully acquired through the stream of interstate commerce. The result was an explosion in direct sales of intoxicating beverages to consumers in dry states by cash-on-delivery shipments from states in which the liquor trade was legal.³⁷⁶

For the next fifteen years, Congress considered a number of bills aimed at overturning *Rhodes* but, for reasons both legal and political, failed to take action. The careful manner in which the Court had interpreted the Wilson Act in *Rahrer*, *Rhodes*, and *Vance* made it clear to Congress that any further steps it took to allow the states to completely ban the importation of alcohol would be constitutionally problematic. The *Rahrer* opinion had emphasized that the power to regulate interstate commerce, “vital to the integrity of the nation... is solely with the general government.”³⁷⁷ The Court had held the Wilson Act constitutional in that case because, it explained, all the law had done was to establish exactly when an item left the stream of interstate commerce, rather than delegate power over that stream. Wilson’s law was therefore an affirmative act of delineation rather than a delegation of power to the states.³⁷⁸ *Rhodes* and *Vance* had clarified exactly where Congress had drawn that line while reemphasizing that any delegation by Congress of a power granted solely to the national legislature by the Constitution would raise serious constitutional problems. Justice White’s opinion in *Vance* stressed that “the previous adjudications of the court” had made clear the “elementary proposition[]” that:

... the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the constitution of the United States to congress, and hence that a state law which denies such a right, or substantially interferes or hampers the same, is in conflict with the constitution of the United States.³⁷⁹

Similarly, in *Rhodes*, White emphasized that Congress, through the Wilson Act, had declared that merchandise that had reached a recipient through the stream of interstate commerce was no longer a part of that stream, and if the states wished to bar the item from resale, there would be no constitutional problem, for such sales were “but an incident” of interstate commerce.³⁸⁰ **The opinion made it clear, however, that states could not be given the right to ban importation altogether:**

On the other hand, the right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state.³⁸¹

Overcoming these constitutional concerns was made all the more difficult by a lack of effort and coordination among temperance activists and legislators sympathetic to their cause in addressing the issue. Prohibitionists initially hesitated to pursue action on the federal level, preferring instead to attack the cash-on-delivery business in the states, the traditional battlegrounds for prohibition.³⁸² The result was a sequence of divergently worded bills with varying levels of support, all of which the liquor lobby found easy enough to defeat,³⁸³ usually with the help of senators and representatives representing areas where distilling or brewing was important to the local economy.³⁸⁴ Congressional opponents of the bill relied primarily on constitutional arguments, using the Supreme Court’s Commerce Clause jurisprudence in *Rhodes* and *Vance* to convince a majority of their colleagues that it was senseless to delegate to the states a power that would inevitably be struck down as unconstitutional.³⁸⁵

³⁸⁰*Rhodes*, 170 U.S. at 424.

³⁸²HAMM, *supra* note 7, at 181-82.

³⁸³JOHNSON *supra* note 1, at 281.

³⁸⁴HAMM, *supra* note 7, at 206.

³⁸⁵*Id.* at 206-07.

By the end of the first decade of the twentieth century, however, the nature of the relationship between the federal government and the states had changed to a degree that made concerted federal-level effort on the part of the prohibitionists the logical next step in their crusade. As evidenced by such measures as the Interstate Commerce Act of 1887, the Sherman Anti-Trust Act of 1890, the Anti-Lottery Act of 1895, and most notably the 1906 Food and Drugs Act, Congress was increasingly willing to use the interstate commerce power to address important social questions that affected the nation as a whole.³⁸⁶ Under these circumstances, therefore, temperance activists slowly began to turn their efforts to convincing Congress to build upon on what it had done of its own initiative through the Wilson Act.³⁸⁷ Beginning in 1903³⁸⁸ and culminating in a major national conference in 1911,³⁸⁹ supporters of prohibition directed their efforts towards producing and presenting to Congress a bill that would overturn *Rhodes* and *Vance* without violating the Court's warnings against the unconstitutional delegation of power to the states.

As a result of these efforts, in December 1911 the temperance lobby produced a bill designed to deprive intoxicating beverages of their character as subjects of interstate commerce under certain *circumstances*, a departure in style from the failed bills of the past decade that had attempted to directly overrule *Rhodes* by mandating an earlier *point in time* at which alcohol was designated to have left the stream of interstate commerce.³⁹⁰ The measure was introduced in the Senate by William S. Kenyon of Iowa and in the House by Morris Sheppard of Texas with the support of the Anti-Saloon League in early 1912, but due to the zealous advocacy of co-sponsor Representative E. Yates Webb of North Carolina, a passionate prohibitionist, it soon became known as the Webb-Kenyon Bill.³⁹¹ The bill was meant to prohibit the shipment or transportation of intoxicating beverages from one state to another whenever the beverages were intended to be received,

³⁸⁶*Id.* at 199.

³⁸⁷*Id.* at 188-89; *see generally id.* at 188-201.

³⁸⁸*Id.* at 207.

³⁸⁹JOHNSON *supra* note 1, at 281-82.

³⁹⁰HAMM, *supra* note 7, at 213.

³⁹¹*Id.*

possessed, sold, or used in violation of the latter state's laws.³⁹²

The bill's opponents attacked it on both constitutional and practical grounds. They charged not only that it was an unconstitutional delegation of the commerce power to the states³⁹³ but also that it violated the constitutional liberties of individual citizens, who would not be allowed to import liquor for personal use or for use as sacramental wine for religious purposes.³⁹⁴ The liquor industry charged that the bill would allow states to pass laws persecuting both citizens who wished to obtain intoxicating beverages and those who provided them; moreover, it charged that if the bill passed, the federal government would be helpless to prevent dry states from crippling the liquor trade on a nationwide basis by denying the use of their roads and rails for liquor shipments from one non-dry state to another.³⁹⁵

Congressional proponents of the bill vigorously defended it on all fronts. To those who attacked the bill on the grounds that it unconstitutionally delegated power from Congress to the states, they countered that it was not a delegation of power but instead the establishment of a uniform national rule, making it illegal for *anyone* from *any* state to ship intoxicating beverages into a state in violation of the laws of that state.³⁹⁶ In response to criticisms of the bill's effect on individual rights, they raised the subject of states' rights, garnering support in the Democratic Congress by portraying the bill as nothing more than a return of the states' police power over intoxicating beverages that had been established in *The License Cases* but stolen in *Bowman* and *Leisy*.³⁹⁷

The success of these arguments, coupled with an unprecedented federal lobbying campaign by temperance activists, ensured the bill's passage. Beginning with the bill's introduction in January 1912, the prohibition movement used all its resources to ensure that the people and the press of the nation would place members

³⁹²*Id.*

³⁹³*Id.* at 214.

³⁹⁴*Id.* at 215.

³⁹⁵*Id.* at 215-16.

³⁹⁶*Id.* at 214.

³⁹⁷*Id.* at 216.

of Congress under unrelenting pressure to vote for the measure.³⁹⁸ This constant bombardment by the temperance lobby was in contrast to a poor showing by the liquor lobby, which proved unable to move beyond its base of support among senators and representatives from non-prohibition states, especially those in which distilleries or breweries could be found.³⁹⁹ After a lengthy period of debate in which numerous amendments were introduced and subsequently defeated in a series of attempts to derail the legislation, the measure passed both the House and Senate by landslide margins on February 8 and 9, 1913, respectively.⁴⁰⁰ Despite its overwhelming margins of victory in both houses of Congress, the bill was dealt a temporary setback by President Taft. The lame-duck president and future chief justice, relying on his own evaluation of the bill and advice from his Attorney General, George W. Wickersham, vetoed the measure, informing Congress that his action was based on his belief that the bill was “in substance and effect a delegation by Congress to the states of the power of regulating interstate commerce.”⁴⁰¹ He believed the bill to be both unconstitutional and pernicious, for it would destroy the Framers’ carefully constructed plan freeing interstate commerce of “the burdens which local state jealousies and purposes had in the past imposed upon it.”⁴⁰² Taft waited until the 28th of February, immediately before the adjournment of Congress, to deliver his veto, but both houses refused to be deterred. The Senate passed the bill over the veto by a margin of sixty-three to twenty-one that very same day, and the House’s re-passage of the bill on March 1 by a 244 to ninety-five margin made it law.⁴⁰³

The enactment of the Webb-Kenyon Act, subtitled “An Act Divesting intoxicating liquors of their interstate character in certain cases,”⁴⁰⁴ marked an overwhelming and decisive victory for the prohibitionists. The act mandated that the “shipment or transportation” of “any spirituous, vinous, malted, fermented, or other

³⁹⁸*Id.* at 216-17.

³⁹⁹*Id.* at 217.

⁴⁰⁰JOHNSON *supra* note 1, at 283-84.

⁴⁰¹HAMM, *supra* note 7, at 218.

⁴⁰²*Id.*

⁴⁰³JOHNSON *supra* note 1, at 284-85.

⁴⁰⁴Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913).

intoxicating liquor of any kind” from one state to another when such beverages were “intended by any person interested therein, to be received, possessed, sold or in any manner used, either in the original package or otherwise in violation of any law of such State. . . is hereby prohibited.”⁴⁰⁵ In essence, the act gave the states *carte blanche* over the matter of liquor regulation, for it rendered the interstate Commerce Clause protection inapplicable towards intoxicating beverages in the face of any state law banning their import. Under the Webb-Kenyon Act, all of the dry states’ safeguards against the importation of intoxicating beverages that had been rendered unconstitutional by *Bowman*, *Leisy*, and *Rhodes* were made valid once again.⁴⁰⁶

XII. CONCLUSION AND POSTSCRIPT

The passage of the Webb-Kenyon Act marked the beginning of the inexorable drive for a constitutional amendment establishing prohibition on a nationwide basis,⁴⁰⁷ an epic subject that is beyond the scope of this paper but can be briefly summarized as follows. In its 1913 annual convention, the powerful Anti-Saloon League appointed a commission to draft a constitutional amendment banning the sale, manufacture, transportation, or importation of intoxicating liquors in the United States, which was presented December 10, 1913 to Senator Morris Sheppard of Texas and Representative Richmond Hobson of Alabama by several thousand marchers forming a “human petition” in support of the measure.⁴⁰⁸ The amendment submitted by the two men, both Democrats and ardent prohibitionists, garnered a majority in its first vote in the House,⁴⁰⁹ and although it did not reach the two-thirds majority required for submission to the states, it nonetheless

⁴⁰⁵ *Id.* at 699-700 (1913).

⁴⁰⁶ HAMM, *supra* note 7, at 220-21.

⁴⁰⁷ See generally *id.* at 220; LARRY ENGELMANN, *INTEMPERANCE* 66 (1979); JOHNSON *supra* note 1, at 285.

⁴⁰⁸ HAMM, *supra* note 7, at 228.

⁴⁰⁹ JOHNSON *supra* note 1, at 288-89.

became a rallying point for the prohibitionists.⁴¹⁰ Even as the battle for national prohibition intensified, state after state took matters into its own hands, delivering ever-greater momentum to the cause of prohibition. By 1917, twenty-three states had enacted their own prohibition measures.⁴¹¹ In January of that year, in the case of *Clark Distilling Co. v. Western Maryland Railway Co.*,⁴¹² the Supreme Court definitively upheld the constitutionality of the Webb-Kenyon Act, holding that the constitutional power exerted to enact that law was “essentially identical” to that exercised under the unquestionably constitutional Wilson Act.⁴¹³ Chief Justice White explained:

[W]e can see no reason for saying that although Congress, in view of the nature and character of intoxicants, had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce.⁴¹⁴

A month later, pro-liquor Senator James Reed of Missouri inadvertently handed a major victory to the prohibitionists by proposing what he thought was sure to be a controversial amendment to a popular bill calling for federal penalties against anyone using the mail to send liquor advertisements into a state in which such advertisements were illegal. Reed’s ‘radical’ amendment, designed to split, and thus embarrass, the prohibition forces, called for an outright ban on the shipment of all intoxicating beverages into dry states, whether or not the state itself had banned importation.⁴¹⁵ To Reed’s horror, the amendment passed both Houses of Congress, and what became known as the Reed Bone-Dry Amendment became law in 1917 as part of a post office appropriations bill.⁴¹⁶ The Food Control Act of 1917,⁴¹⁷ a wartime measure, made the production of distilled spirits for beverage purposes illegal, to which injury Congress added the insult

⁴¹⁰*Id.*

⁴¹¹ENGLEMANN, *supra* note 407, at 66.

⁴¹²242 U.S. 311 (1917).

⁴¹³*Id.* at 330.

⁴¹⁵HAMM, *supra* note 7, at 238.

⁴¹⁶Act of March 3, 1917, ch. 162, 39 Stat. 1058, 1069 (1917)

⁴¹⁷Ch. 52, 40 Stat. 273 (1917).

of increased taxes on the sale of all spirits that had been distilled before the enactment of the ban on distilling.⁴¹⁸ Finally, the War Time Prohibition Act,⁴¹⁹ which became effective July 1, 1919, made it illegal to sell spirits or wine until the conclusion of the postwar demobilization.

By this point, Prohibition was all but a certainty. On December 17, 1917, the measure that was to become the Eighteenth Amendment passed the House by a vote of 282 to 128; the next day, it gained Senate approval by the overwhelming margin of forty-seven to eight.⁴²⁰ On January 16, 1919, the amendment went into effect with its ratification by Nebraska, the thirty-sixth of what would ultimately be forty-six states giving their approval to the measure.⁴²¹ Later that year, with the enactment of the Volstead Act and its ban on the manufacture and sale of intoxicating beverages,⁴²² Prohibition began.

Prohibition, of course, did not bring about a resolution of the debate over intoxicating beverages and the eradication of “demon rum” and its pernicious effects from American society as its proponents had envisioned⁴²³ but instead led to an even greater struggle. In his book Intemperance: The Lost War Against Liquor, author Larry Englemann explained:

Laws alone would never quench mankind’s age-old thirst for intoxicating liquor. The apostles of prohibition who stirred the masses with heady visions of a world redeemed from alcohol were guilty of a fundamental misconception. The Eighteenth Amendment, they assumed, was a final treaty of peace with the liquor traffic. They were wrong. The Eighteenth Amendment was, in fact, a declaration of war.⁴²⁴

⁴¹⁸War Revenue Act, ch. 40, Stat. 300, 310 (1917).

⁴¹⁹Ch. 212, 40 Stat. 1045, 1046-47 (1918).

⁴²⁰HAMM, *supra* note 7, at 247.

⁴²¹*Id.* Only Connecticut and Rhode Island withheld assent.

⁴²²Volstead Act, ch. 85, 41 Stat. 305 (1919).

⁴²³Fiery evangelist Billy Sunday, one of the temperance movement’s staunchest advocates, famously eulogized “Old John Barleycorn” as follows:

Good-bye, John. You were God’s worst enemy. You were hell’s best friend. I hate you with a perfect hatred. I love to hate you. . . . [T]he reign of tears is over. The slums will soon be a memory. We will turn our prisons into factories and our jails into storehouses and corncribs. Men will walk upright now, women will smile and children will laugh. Hell will be forever for rent. ENGLEMAN, *supra* note 407, at xi (quoting Billy Sunday).

The result of that war was the end of Prohibition and the creation of a regime of federal regulation of alcohol built largely on the legacy of the pre-Prohibition federal role. The Twenty-First Amendment itself conclusively addressed a part of that legacy, the dormant Commerce Clause issue that had so bedeviled Congress and the Court for decades. Section 2 of the amendment reads, “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited”⁴²⁵ - a striking passage definitively solving the issue only partially addressed by the Wilson Act and Webb-Kenyon Act by using the Constitution itself to grant states the ability to keep alcohol from entering their borders, notwithstanding the Commerce Clause.

The basic federal regulatory regime in place today is framed by the Federal Alcohol Administration Act of 1935 (the “FAA Act”),⁴²⁶ which was based largely on the 1868 act,⁴²⁷ the tax and collection provisions of which had never been repealed, as well as the Food and Drugs Act. The specificity of the labeling requirements of alcoholic beverages contained within the FAA Act, combined with the lack of any specific mention of alcohol in the Federal Food, Drugs, and Cosmetics Act of 1938,⁴²⁸ led to a series of court rulings that have established a division of responsibility in carrying out the federal government’s role in regulating alcohol. While the Food and Drug Administration, the successor agency to Wiley’s Bureau of Chemistry, maintains jurisdiction over the adulteration of alcoholic beverages, the Bureau of Alcohol, Tobacco, and Firearms (“BATF”) regulates their labeling.⁴²⁹

⁴²⁵U.S. CONSTITUTION. amend. XXI, §2.

⁴²⁶Act of August 29, 1935, ch. 814, 49 Stat. 977 (1935) (codified as amended at 27 U.S.C.S. §§ 201-218 (2001)).

⁴²⁷See *supra* note 204-209 and accompanying text.

⁴²⁸This silence marked a departure from the Federal Food and Drugs Act of 1906, which explicitly mentioned alcoholic beverages at several points. See *supra* note 321-323.

⁴²⁹See *United States v. 1,800.2625 Wine Gallons of Distilled Spirits*, 121 F. Supp. 735 (W.D. Mo. 1954) (holding that wines and distilled spirits contaminated by flood waters were adulterated and misbranded under §402(a) of the Federal Food, Drugs, and Cosmetics Act of 1938); *Brown-Foreman Distillers Corp. v. Matthews*, 435 F. Supp. 5 (W.D. Ky. 1976) (holding that despite applicability of adulteration provisions of Federal Food, Drugs, and Cosmetics Act of 1938 to adulteration of alcoholic beverage, BATF has exclusive jurisdiction over labeling of such); see generally PETER BARTON HUTT & RICHARD A. MERRILL, *FOOD AND DRUG LAW* 78-79 (2d ed. 1991).

As for the regulations that have been promulgated by the BATF, Dr. Wiley would perhaps be greatly disappointed. The BATF defines “whisky” as “an alcoholic distillate from a fermented mash of grain produced at less than 190° proof in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to whisky, stored in oak containers. . . and bottled at not less than 80° proof, [including] mixtures of such distillates for which no specific standards of identities are prescribed,”⁴³⁰ a definition not at all dissimilar to that suggested, to Wiley’s horror, by Department of Agriculture Solicitor George McCabe in 1907.⁴³¹

Notwithstanding the final outcome of the “What is Whisky?” battle, Dr. Wiley would likely be pleased with the federal role in the regulation of intoxicating beverages today, as would James Madison, Alexander Hamilton, David A. Wells, and all of their contemporaries who argued for a substantive federal role over alcoholic beverages. The precedents they established regarding taxation and adulteration survived the era of Prohibition and continue to influence the federal government’s regulation of intoxicating beverages to the present day.

⁴³⁰27 C.F.R. §5.22(b) (2001).

⁴³¹“Whisky is any alcoholic beverage made from grain, properly colored and flavored, according to the prevailing custom of the trade,” WILEY, HISTORY OF A CRIME, *supra* note 293, at 109; *see supra* note 330 and accompanying text.